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ABSTRACT

The document contains an appendix to a larger document on child advocacy for handicapped students needing special education. Appended material includes regulations for Section 504 of the Rehabilitation Act of 1973, the Buckley Amendment, and Developmental Disabilities Act, policy interpretations from the Department of Education regarding individualized education programs, clean intermittent catheterization, and use of insurance proceeds; policy interpretations from the Department of Health, Education, and Welfare regarding such aspects as program accessibility, participation of the handicapped in contact sports, and school board members as hearing officers; and guidelines from the U.S. Office for Civil Rights for eliminating discrimination and denial of services on the basis of handicap. (CL)

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SPECIAL EDUCATION: A Manual for Advocates

Volume II

Diana Pullin

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NOTE TO THE READER:

Volume II contains Appendix B only. Volume I of SPECIAL EDUCATION contains text chapters one to five and their individual appendices, the glossary, the bibliography and Appendix A. See the detailed table of contents in Volume I.

The facing page is a short table of contents for Appendix B.

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CHAPTER 33. EDUCATION OF THE HANDICAPPED

GENERAL PROVISIONS

§ 1401. Definitions

As used in this title [20 USCS §§ 1401 et seq.]—

(1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

(2) The term "Commissioner" means the Commissioner of Education.

(3) The term "Advisory Committee" means the National Advisory Committee on Handicapped Children.

(4) The term "construction", except where otherwise specified, means (A) erection of new or expansion of existing structures, and the acquisition and installation of equipment therefor; or (B) acquisition of existing structures not owned by any agency or institution making application for assistance under this title [20 USCS §§ 1401 et seq.]; or (C) remodeling or alteration (including the acquisition, installation, modernization, or replacement of equipment) of existing structures; or (D) acquisition of land in connection with the activities in clauses (A), (B), and (C); or (E) a combination of any two or more of the foregoing.

(5) The term "equipment" includes machinery, utilities, and built-in equipment and any necessary enclosures or structures to house them, and includes all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture, printed, published, and audio-visual instructional materials, Telecommunications, sensory, and other technological aids and devices, and books, periodicals, documents, and other related materials.

(6) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands and the Trust Territory of the Pacific Islands.

(7) The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(8) The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(9) The term "elementary school" means a day or residential school which provides elementary education, as determined under State law.

(10) The term "secondary school" means a day or residential school which provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

(11) The term "institution of higher education" means an educational institution in any State which—

(A) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(B) is legally authorized within such State to provide a program of education beyond high school;

(C) provides an educational program for which it awards a bachelor's degree, or provides not less than a two-year program which is acceptable for full credit toward such a degree, or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge;

(D) is a public or other nonprofit institution; and

(E) is accredited by a nationally recognized accrediting agency or association listed by the Commissioner pursuant to this paragraph or, if not so accredited, is an institution whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited: Provided, however, That in the case of an institution offering a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge, if the Commissioner determines that there is no nationally recognized accrediting agency or association qualified to accredit such institutions, he shall appoint an advisory committee, composed of persons specially qualified to evaluate training provided by such institutions, which shall prescribe the standards of content, scope, and quality which must be met in order to qualify such institutions to participate under this Act [20 USCS §§ 1401 et seq.] and shall also determine whether particular institutions meet such standards. For the purposes of this paragraph the Commissioner shall publish a list of nationally recognized accrediting agencies or associations which he determines to be reliable authority as to the quality of education or training offered.

(12) The term "nonprofit" as applied to a school, agency, organization, or institution means a school, agency, organization, or institution owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(13) The term "research and related purposes" means research, research training (including the payment of stipends and allowances), surveys, or demonstrations in the field of education of handicapped children, or the dissemination of information derived therefrom, including (but without limitation) experimental schools.

(14) The term "Secretary" means the Secretary of Health, Education, and Welfare.

(15) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

(18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 614(a)(5) [20 USCS § 1414(a)(5)].

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

(20) The term "excess costs" means those costs which are in excess of the average annual per student expenditure in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting (A) amounts received under this part [20 USCS §§ 1401 et seq.] or under title I [20 USCS §§ 241a et seq.] or title VII [20 USCS §§ 880b et seq.] of the Elementary and Secondary Education Act of 1965, and (B) any State or local funds expended for programs which would qualify for assistance under this part or under such titles.

(21) The term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act (20 U.S.C. 880b-1(a)(2)).

(22) The term "intermediate educational unit" means any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to handicapped children within that State.

(Apr. 13, 1970, P. L. 91-230, Title VI, Part A, § 602, 84 Stat. 175; Nov. 29, 1975, P. L. 94-142, § 4(a), 89 Stat. 775.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1975. Act Nov. 29, 1975, in para. (1), substituted "orthopedically impaired" for "crippled"; in para. (5), inserted "telecommunications, sensory, and other technological aids and devices,"; in para. (15), inserted "cultural, or economic" in the last sentence; and added paras. (16)-(22).

Effective dates:

Section 8(b) of Act Nov. 29, 1975, provided that the amendments to this section "shall take effect on October 1, 1977 . . ."; see effective dates notes to 20 USCS § 1411.

Short titles Statement of findings:

Section 601 of Act Apr. 13, 1970, P. L. 91-230, Title VI, Part A, 84 Stat. 125; as amended by Act Nov. 29, 1975, P. L. 94-142, § 3(a), 89 Stat. 774, provided:—"(a) This title [20 USCS §§ 1401 et seq.] may be cited as the 'Education of the Handicapped Act'. "(b) The Congress finds that—

"(1) there are more than eight million handicapped children in the United States today;

"(2) the special educational needs of such children are not being fully met;

"(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

"(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

"(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;

"(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

"(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;

"(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

"(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

"(c) It is the purpose of this Act to assure that all handicapped children have available to them, within the time periods specified in section 612(2)(B), a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children."

Section 1 of Act Nov. 29, 1975, P. L. 94-142, 89 Stat. 773, provided "this Act [1975 amendments to this chapter] may be cited as the 'Education for All Handicapped Children Act of 1975'."

Section 1 of Act June 17, 1977, P. L. 94-49, 91 Stat. 230, provided that "this Act may be cited as the 'Education of the Handicapped Amendments of 1977'." For full classification of this Act, consult USCS Tables volumes.

Other provisions:

Change of name. For change of name of the Department of Health, Education, and Welfare to the Department of Health and Human Services, see 20 USCS § 3508 and notes.

CODE OF FEDERAL REGULATIONS

Add:

45 CFR Part 116b.

45 CFR Part 121h.

45 CFR Part 160d.

RESEARCH GUIDE

Law Review Articles:

Roos, the Potential Impact of Rodriguez on Other School Reform Litigation. 38 Law & Contemp Prob 566.

Krass, The Right to Public Education for Handicapped Children: A Primer for the New Advocate. 1976 U Ill L F 1016.

Rosenburg & Rosenberg, Truancy, School Phobia and Minimal Brain Dysfunction. 61 Minn L Rev 543.

Federal Regulation of Employment Service:

FRES, Discrimination on Federal Projects § 6:84.

§ 1402. Bureau for education and training of the handicapped

(a) There shall be, within the Office of Education, a bureau for the education and training of the handicapped which shall be the principal agency in the Office of Education for administering and carrying out programs and projects relating to the education and training of the handicapped, including programs and projects for the training of teachers of the handicapped and for research in such education and training.

(b)(1) The Bureau established under subsection (a) shall be headed by a Deputy Commissioner of Education who shall be appointed by the Commissioner, who shall report directly to the Commissioner, be compensated at the rate specified for, and placed in, grade 18 of the General Schedule set forth in section 5332 of title 5, United States Code [5 USCS § 5332].

(2) In addition to such Deputy Commissioner, there shall be placed in such Bureau five positions for persons to assist the Deputy Commissioner in carrying out his duties, including the position of Associate

Deputy Commissioner, and such positions shall be placed in grade 16 of the General Schedule set forth in section 5332 of title 5, United States Code [5 USCS § 5332].

(Apr. 13, 1970, P. L. 91-230, Title VI, Part A, § 603, 84 Stat. 177; Aug. 21, 1974, P. L. 93-380, Title VI, Part B, § 612(a), 88 Stat. 579.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1974. Act Aug. 21, 1974, inserted "(a)" preceding "There"; and added subsec. (b).

Effective dates:

Section 612(b)(2) of Act Aug. 21, 1974, provided that the amendments to this section "shall become effective upon the enactment of this Act [enacted Aug. 21, 1974]."

Short titles:

Section 611 of Act Aug. 21, 1974, provided that "This title may be cited as the 'Education of the Handicapped Amendments of 1974'." Although the statute referred to "This title" it appears that the intention was to refer to Part B of title VI of the Act of Aug. 21, 1974 entitled "Education of the Handicapped" which made amendments to 20 USCS §§ 1402 et seq. The other parts of title VI of Act Aug. 21, 1974 deal with adult education, Indian education, emergency school aid, and national defense education.

Other provisions:

Effect on civil service laws. Section 612(b)(1) of Act Aug. 21, 1974, P. L. 93-380, Title VI, Part B, 88 Stat. 580; Oct. 12, 1976, P. L. 94-482, Title V, Part A, § 501(a)(11), 90 Stat. 2235, provided: "The positions created by subsection (b) of section 603 of the Education of the Handicapped Act [Deputy Commissioner of Education; see 20 USCS § 1402(b)] shall be in addition to the number of positions placed in the appropriate grades under section 5108 of title 5, United States Code [5 USCS § 5108], and such positions shall be in addition to, and without prejudice against, the number of positions otherwise placed in the Office of Education under such section 5108 or under other law. Nothing in this section shall be deemed as limiting the Commissioner from assigning additional General Schedule positions in grades 16, 17, and 18 to the Bureau should he determine such additions to be necessary to operate programs for educating handicapped children authorized by this Act [see Short titles note above]."

RESEARCH GUIDE

Law Review Articles:

Krass, The Right to Public Education for Handicapped Children: A Primer for the New Advocate. 1976 U Ill L F 1016.

§ 1403. National Advisory Committee on Handicapped Children

(a) The Commissioner shall establish in the Office of Education a National Advisory Committee on Handicapped Children, consisting of fifteen members, appointed by the Commissioner. At least eight of such members shall be persons affiliated with educational, training, or research programs for the handicapped.

(b) The Advisory Committee shall review the administration and operation of the programs authorized by this title [20 USCS §§ 1401 et seq.] and other provisions of law administered by the Commissioner with respect to handicapped children, including their effect in improving the educational attainment of such children, and make recommendations for the improvement of such administration and operation with respect to such children. Such recommendations shall take into consideration experience gained under this and other Federal programs for handicapped children and, to the extent appropriate, experience gained under other public and private programs for handicapped children. The Advisory Committee shall from time to time make such recommendations as it may deem appropriate to the Commissioner and shall make an annual report of its findings and recommendations to the Commissioner not later than June 30 of each year. The Commissioner shall transmit each such report to the Secretary together with his comments and recommendations, and the Secretary shall transmit such report, comments, and recommendations to the Congress together with any comments or recommendations he may have with respect thereto. The Advisory Committee shall continue to exist until October 1, 1977.

(c) There are authorized to be appropriated for the purposes of this section \$100,000 for the fiscal year ending June 30, 1974, and for each of the three succeeding fiscal years.

(Apr. 13, 1970, P. L. 91-230, Title VI, Part A, § 604, 84 Stat. 177; Aug. 21, 1974, P. L. 93-380, Title VI, Part B, § 613, 88 Stat. 580.)

(As amended Apr. 21, 1976, P. L. 94-273, §§ 3(14), 13(2), 90 Stat. 376, 378.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1974. Act Aug. 21, 1974, in subsec. (b), added the last sentence beginning "The Advisory Committee . . ."; and

Added subsec. (c).

1976. Act Apr. 21, 1976, substituted "October" for "July" wherever it appears in subsec. (b); and substituted "June 30" for "March 31" in subsec. (b).

RESEARCH GUIDE

Law Review Articles:

Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*. 1976 U Ill L F 1016.

Effective dates:

Section 2(c)(1) of Act Aug. 21, 1974, provided that the amendments to this section made by that Act "shall be effective on and after the sixtieth day after the enactment of this Act [enacted Aug. 21, 1974]".

§ 1404. Acquisition of equipment and construction of facilities

(a) In the case of any program authorized by this title [20 USCS §§ 1401 et seq.], if the Commissioner determines that such program will be improved by permitting the funds authorized for such program to be used for the acquisition of equipment and the construction of necessary facilities, he may authorize the use of such funds for such purposes.

(b) If within twenty years after the completion of any construction (except minor remodeling or alteration) for which funds have been paid pursuant to a grant or contract under this title [20 USCS §§ 1401 et seq.] the facility

constructed ceases to be used for the purposes for which it was constructed, the United States, unless the Secretary determines that there is good cause for releasing the recipient of the funds from its obligation, shall be entitled to recover from the applicant or other owner of the facility an amount which bears the same ratio to the then value of the facility as the amount of such Federal funds bore to the cost of the portion of the facility financed with such funds. Such value shall be determined by agreement of the parties or by action brought in the United States district court for the district in which the facility is situated.

(Apr. 13, 1970, P. L. 91-230, Title VI, Part A, § 605, 84 Stat. 177.)

§ 1405. Employment of handicapped individuals

The Secretary shall assure that each recipient of assistance under this Act [20 USCS §§ 1401 et seq.] shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this Act [20 USCS §§ 1401 et seq.].

(Apr. 13, 1970, P. L. 91-230, Title VI, Part A, § 606, as added Nov. 29, 1975, P. L. 94-142, § 6(a), 89 Stat. 795.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective dates:

Section 8(b) of Act Nov. 29, 1975, provided that this section become effective on the date of enactment [enacted Nov. 29, 1975]; see effective dates note to 20 USCS § 1411.

§ 1406. Grants for the removal of architectural barriers

(a) Upon application by any State or local educational agency or intermediate educational unit the Commissioner is authorized to make grants to pay part or all of the cost of altering existing buildings and equipment in the same manner and to the same extent as authorized by the Act approved August 12, 1968 (Public Law 90-480) [42 USCS §§ 4151 et seq.], relating to architectural barriers.

(b) For the purpose of carrying out the provisions of this section, there are authorized to be appropriated such sums as may be necessary.

(Apr. 13, 1970, P. L. 91-230, Title VI, Part A, § 607, as added Nov. 29, 1975, P. L. 94-142, § 6(a), 89 Stat. 795.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective dates:

Section 8(b) of Act Nov. 29, 1975, provided that this section become effective on the date of enactment [enacted Nov. 29, 1975]; see effective dates note to 20 USCS § 1411.

ASSISTANCE FOR EDUCATION OF ALL HANDICAPPED
CHILDREN

§ 1411. Entitlements and allocations

[Caution: For fiscal years 1975, 1976 and 1977 see Other provisions note below]

(a)(1) Except as provided in paragraph (3) and in section 619 [20 USCS § 1419], the maximum amount of the grant to which a State is entitled under this part [20 USCS §§ 1411 et seq.] for any fiscal year shall be equal to—

(A) the number of handicapped children aged three to twenty-one, inclusive, in such State who are receiving special education and related services;

multiplied by—

(B)(i) 5 per centum, for the fiscal year ending September 30, 1978, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(ii) 10 per centum, for the fiscal year ending September 30, 1979, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(iii) 20 per centum, for the fiscal year ending September 30, 1980, of the average per pupil expenditure in public elementary and secondary schools in the United States;

(iv) 30 per centum, for the fiscal year ending September 30, 1981, of the average per pupil expenditure in public elementary and secondary schools in the United States; and

(v) 40 per centum, for the fiscal year ending September 30, 1982, and for each fiscal year thereafter, of the average per pupil expenditure in public elementary and secondary schools in the United States;

except that no State shall receive an amount which is less than the amount which such State received under this part for the fiscal year ending September 30, 1977.

(2) For the purpose of this subsection and subsection (b) through subsection (e), the term "State" does not include Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(3) The number of handicapped children receiving special education and related services in any fiscal year shall be equal to number of such children receiving special education and related services on December 1 of the fiscal year preceding the fiscal year for which the determination is made.

(4) For purposes of paragraph (1)(B), the term "average per pupil expenditure", in the United States, means the aggregate current expenditures, during the second fiscal year preceding the fiscal year for which

the computation is made (or, if satisfactory data for such year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the United States (which, for purposes of this subsection, means the fifty States and the District of Columbia), as the case may be, plus any direct expenditures by the State for operation of such agencies (without regard to the source of funds from which either of such expenditures are made), divided by the aggregate number of children in average daily attendance to whom such agencies provided free public education during such preceding year.

(5)(A) In determining the allotment of each State under paragraph (1), the Commissioner may not count—

(i) handicapped children in such State under paragraph (1)(A) to the extent the number of such children is greater than 12 per centum of the number of all children aged five to seventeen, inclusive, in such State; and

(ii) handicapped children who are counted under section 121 of the Elementary and Secondary Education Act of 1965 [20 USCS § 241c-1].

(B) For purposes of subparagraph (A), the number of children aged five to seventeen, inclusive, in any State shall be determined by the Commissioner on the basis of the most recent satisfactory data available to him.

(b)(1) Of the funds received under subsection (a) by any State for the fiscal year ending September 30, 1978—

(A) 50 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and

(B) 50 per centum of such funds shall be distributed by such State pursuant to subsection (d) to local educational agencies and intermediate educational units in such State, for use in accordance with the priorities established under section 612(3).

(2) Of the funds which any State may use under paragraph (1)(A)—

(A) an amount which is equal to the greater of—

(i) 5 per centum of the total amount of funds received under this part [20 USCS §§ 1411 et seq.] by such State; or

(ii) \$200,000;

may be used by such State for administrative costs related to carrying out sections 612 and 613 [20 USCS §§ 1412, 1413];

(B) the remainder shall be used by such State to provide support services and direct services, in accordance with the priorities established under section 612(3) [20 USCS § 1412(3)].

(c)(1) Of the funds received under subsection (a) by any State for the fiscal year ending September 30, 1979, and for each fiscal year thereafter—

- (A) 25 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and
- (B) except as provided in paragraph (3), 75 per centum of such funds shall be distributed by such State pursuant to subsection (d) to local educational agencies and intermediate educational units in such State, for use in accordance with priorities established under section 612(3) [20 USCS § 1412(3)].
- (2)(A) Subject to the provisions of subparagraph (B), of the funds which any State may use under paragraph (1)(A)—
- (i) an amount which is equal to the greater of—
 - (I) 5 per centum of the total amount of funds received under this part [20 USCS §§ 1411 et seq.] by such State; or
 - (II) \$200,000;
 - may be used by such State for administrative costs related to carrying out the provisions of sections 612 and 613 [20 USCS §§ 1412, 1413]; and
 - (ii) the remainder shall be used by such State to provide support services and direct services, in accordance with the priorities established under section 612(3) [20 USCS § 1412(3)].
- (B) The amount expended by any State from the funds available to such State under paragraph (1)(A) in any fiscal year for the provision of support services or for the provision of direct services shall be matched on a program basis by such State, from funds other than Federal funds, for the provision of support services or for the provision of direct services for the fiscal year involved.
- (3) The provisions of section 613(a)(9) [20 USCS § 1413(a)(9)] shall not apply with respect to amounts available for use by any State under paragraph (2).
- (4)(A) No funds shall be distributed by any State under this subsection in any fiscal year to any local educational agency or intermediate educational unit in such State if—
- (i) such local educational agency or intermediate educational unit is entitled, under subsection (d), to less than \$7,500 for such fiscal year; or
 - (ii) such local educational agency or intermediate educational unit has not submitted an application for such funds which meets the requirements of section 614 [20 USCS § 1414].
- (B) Whenever the provisions of subparagraph (A) apply, the State involved shall use such funds to assure the provision of a free appropriate education to handicapped children residing in the area served by such local educational agency or such intermediate educational unit. The provisions of paragraph (2)(B) shall not apply to the use of such funds.
- (d) From the total amount of funds available to local educational agencies and intermediate educational units in any State under subsection (b)(1)(B)

or subsection (c)(1)(B), as the case may be, each local educational agency or intermediate educational unit shall be entitled to an amount which bears the same ratio to the total amount available under subsection (b)(1)(B) or subsection (c)(1)(B), as the case may be, as the number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in such local educational agency or intermediate educational unit bears to the aggregate number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in all local educational agencies and intermediate educational units which apply to the State educational agency involved for funds under this part [20 USCS §§ 1411 et seq.].

(e)(1) The jurisdictions to which this subsection applies are Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(2) Each jurisdiction to which this subsection applies shall be entitled to a grant for the purposes set forth in section 601(c) [20 USCS § 1401 note] in an amount equal to an amount determined by the Commissioner in accordance with criteria based on respective needs, except that the aggregate of the amount to which such jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 per centum of the aggregate of the amounts available to all States under this part [20 USCS §§ 1411 et seq.] for that fiscal year. If the aggregate of the amounts, determined by the Commissioner pursuant to the preceding sentence, to be so needed for any fiscal year exceeds an amount equal to such 1 per centum limitation, the entitlement of each such jurisdiction shall be reduced proportionately until such aggregate does not exceed such 1 per centum limitation.

(3) The amount expended for administration by each jurisdiction under this subsection shall not exceed 5 per centum of the amount allotted to such jurisdiction for any fiscal year, or \$35,000, whichever is greater.

(f)(1) The Commissioner is authorized to make payments to the Secretary of the Interior according to the need for such assistance for the education of handicapped children on reservations serviced by elementary and secondary schools operated for Indian children by the Department of the Interior. The amount of such payment for any fiscal year shall not exceed 1 per centum of the aggregate amounts available to all States under this part [20 USCS §§ 1411 et seq.] for that fiscal year.

(2) The Secretary of the Interior may receive an allotment under this subsection only after submitting to the Commissioner an application which meets the applicable requirements of section 614(a) [20 USCS § 1414(a)] and which is approved by the Commissioner. The provisions of section 616 [20 USCS § 1416] shall apply to any such application.

(g)(1) If the sums appropriated for any fiscal year for making payments to States under this part [20 USCS §§ 1411 et seq.] are not sufficient to pay

in full the total amounts which all States are entitled to receive under this part [20 USCS §§ 1411 et seq.] for such fiscal year, the maximum amounts which all States are entitled to receive under this part [20 USCS §§ 1411 et seq.] for such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

(2) In the case of any fiscal year in which the maximum amounts for which States are eligible have been reduced under the first sentence of paragraph (1), and in which additional funds have not been made available to pay in full the total of such maximum amounts under the last sentence of such paragraph, the State educational agency shall fix dates before which each local educational agency or intermediate educational unit shall report to the State educational agency on the amount of funds available to the local educational agency or intermediate educational unit, under the provisions of subsection (d), which it estimates that it will expend in accordance with the provisions of this part [20 USCS §§ 1411 et seq.]. The amounts so available to any local educational agency or intermediate educational unit, or any amount which would be available to any other local educational agency or intermediate educational unit if it were to submit a program meeting the requirements of this part [20 USCS §§ 1411 et seq.], which the State educational agency determines will not be used for the period of its availability, shall be available for allocation to those local educational agencies or intermediate educational units, in the manner provided by this section, which the State educational agency determines will need and be able to use additional funds to carry out approved programs.

(Apr. 13, 1970, P. L. 91-230, Title VI, Part B, § 611, 84 Stat. 178; Aug. 21, 1974, P. L. 93-380, Title VI, Part B, § 614(a), (e)(1), (2), 88 Stat. 580, 582; Nov. 29, 1975, P. L. 94-142, §§ 2(a)(1)-(3), 5(a), (c), 89 Stat. 773, 776, 794.)

(As amended Nov. 1, 1978, P. L. 95-561, Title XIII, Part D, § 1341(a), 92 Stat. 2364.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1974. Act Aug. 21, 1974, § 614(a), reenacted this section in its entirety, "effective for fiscal year 1975 only" and is set out as "Other provisions" note below.

Section 614(e)(1), (2) of Act Aug. 21, 1974, in subsec. (a), inserted before the period at the end "in order to provide full education opportunity to all handicapped children"; and

In subsec. (b), substituted "\$100,000,000 for the fiscal year ending June 30, 1976, and \$110,000,000 for the fiscal year ending June 30, 1977" for "\$200,000,000 for the fiscal year ending June 30, 1971, \$210,000,000 for the fiscal year ending June 30, 1972, and \$220,000,000 for the fiscal year ending June 30, 1973".

1975. Section 2(a)(1)-(3) of Act Nov. 29, 1975, amended this section, effective July 1, 1975 as provided by § 8(a) of the Act, as in effect during the fiscal years 1976 and 1977 as follows: In subsecs. (b)(2) and (c)(1) deleted "the Commonwealth of Puerto Rico," preceding "Guam"; and

In subsecs. (c)(2) and (d), substituted "years ending June 30, 1975, and 1976, and for the fiscal year ending September 30, 1977" for "year ending June 30, 1975"; and.

In subsec. (c)(2), substituted "1 per centum" for "2 per centum" each place that it appears.

Section 5(a) of Act Nov. 29, 1975, effective on October 1, 1977 as provided by § 8(c) of the Act, substituted this section for former section that read:

"(a) The Commissioner is authorized to make grants pursuant to the provisions of this part for the purpose of assisting the States in the initiation, expansion, and improvement of programs and projects for the education of handicapped children at the preschool, elementary school, and secondary school levels in order to provide full educational opportunity to all handicapped children.

"(b) For the purpose of making grants under this part there are authorized to be appropriated \$100,000,000 for the fiscal year ending June 30, 1976, and \$110,000,000 for the fiscal year ending June 30, 1977."

Section 5(c) of Act Nov. 29, 1975, effective on the date upon which final regulations prescribed by the Commissioner of Education under subsec. (b) [Other provisions note to this section] take effect, in subsec. (a)(5)(A), added "and" at the end of clause (i), deleted clause (ii) that read "as part of such percentage, children with specific learning disabilities to the extent the number of such children is greater than one-sixth of such percentage; and", and redesignated clause (iii) as clause (ii).

Section 8 of Act Nov. 29, 1975, P. L. 94-142, 89 Stat. 796, provided:

"(a) Notwithstanding any other provision of law, the amendments made by sections 2(a), 2(b), and 2(c) [amendments to 20 USCS §§ 1411, 1412, 1413] shall take effect on July 1, 1975.

"(b) The amendments made by sections 2(d), 2(e), 3, 6, and 7 [amendments to 20 USCS §§ 1232, 1401, 1411, 1453, and enactment of 20 USCS §§ 1405, 1406] shall take effect on the date of the enactment of this Act [enacted Nov. 29, 1975].

"(c) The amendments made by sections 4 and 5(a) [amendments to 20 USCS §§ 1401, 1411-1414, and enactment of 20 USCS §§ 1415-1420] shall take effect on October 1, 1977, except that the provisions of clauses (A), (C), (D), and (E) of paragraph (2) of section 612 of the Act, as amended by this Act [20 USCS § 1412(2)(A), (C), (D), and (E)], section 617(a)(1)(D) of the Act, as amended by this Act [20 USCS § 1417(a)(1)(D)], section 617(b) of the Act, as amended by this Act [20 USCS § 1417(b)], and section 618(a) of the Act, as amended by this Act [20 USCS § 1418(a)], shall take effect on the date of the enactment of this Act [enacted Nov. 29, 1975].

"(d) The provisions of section 5(b) [20 USCS § 1411 note] shall take effect on the date of the enactment of this Act [enacted Nov. 29, 1975]."

1978. Act Nov. 1, 1978, in subsec. (a)(3), deleted "the average of the" following "shall be equal to" and substituted "December 1" for "October 1 and February 1".

Effective dates:

Section 614(a) of Act Aug. 21, 1974, as amended by Act Nov. 29, 1975, P. L. 94-142, § 2(b)(1), 89 Stat. 773, provided that the reenactment of this section is "Effective for the fiscal years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977, only,".

Section 614(e)(3) of Act Aug. 21, 1974, provided that the amendments made by § 614(e)(1), (2) "shall become effective and shall be deemed to have been enacted on July 1, 1975."

Other provisions:

Section 1411 of Title 20 for the fiscal years 1975, 1976 and 1977. Section 614(a) of Act Aug. 21, 1974, P. L. 93-380, Title VI, Part B, 88 Stat. 580, as amended by Act Nov. 29, 1975, P. L. 94-142, § 2(b)(1), provided that "Effective for the fiscal years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977, only, section 611 of the Education of the Handicapped Act [20 USCS § 1411] is amended to read as follows:

"GRANTS TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

"Sec. 611. [§ 1411.] (a) The Commissioner shall, in accordance with the provisions of this part, make payments to States for the purpose of assisting the States in the initiation, expansion, and improvement of programs and projects for the education of handicapped children at the preschool, elementary school, and secondary school levels in order to provide full educational opportunities to all handicapped children. Such payments may be used for the early identification and assessment of handicapping conditions in children under three years of age.

"(b)(1) Subject to the provisions of section 612, the maximum amount of the grant to which a State shall be entitled under this part shall be equal to—

"(A) the number of children aged three to twenty-one inclusive, in that State in the most recent fiscal year for which satisfactory data are available;

multiplied by—

"(B) \$8.75.

"(2) For the purpose of this subsection, the term 'State' does not include Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

"(c)(1) The jurisdictions to which this subsection applies are Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

"(2) Each jurisdiction to which this subsection applies shall, for the fiscal years ending June 30, 1975, and 1976, and for the fiscal year

ending September 30, 1977 be entitled to a grant in an amount equal to an amount determined by the Commissioner, in accordance with criteria established by regulations, needed to initiate, expand, or improve programs and projects for the education of handicapped children at the preschool, elementary school, and secondary school levels, in that jurisdiction, except that the aggregate of the amount to which such jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 per centum of the aggregate of the amounts to which all States are entitled under subsection (b) of this section for that fiscal year. If the aggregate of the amounts, determined by the Commissioner pursuant to the preceding sentence, to be so needed for any fiscal year exceeds an amount equal to such 1 per centum limitation, the entitlement of each such jurisdiction shall be reduced proportionately until such aggregate does not exceed such 1 per centum limitation.

"(d) The Commissioner is authorized for the fiscal years ending June 30, 1975, and 1976, and for the fiscal year ending September 30, 1977 to make payments to the Secretary of the Interior according to the need for such assistance for the education of handicapped children on reservations serviced by elementary and secondary schools operated for Indian children by the Department of the Interior, and the terms upon which payments for such purposes shall be made to the Secretary of the Interior shall be determined pursuant to such criteria as the Commissioner determines will best carry out the purposes of this part. The amount of such payment for any fiscal year shall not exceed 1 per centum of the aggregate amounts to which States are entitled under subsection (b) of this section for that fiscal year."

Regulations prescribed by the Commissioner of Education. Section 5(b) of Act Nov. 29, 1975, P. L. 94-142, 89 Stat. 794, provided:

"(b)(1) The Commissioner of Education shall, no later than one year after the effective date of this subsection [effective Nov. 29, 1975], prescribe—

"(A) regulations which establish specific criteria for determining whether a particular disorder or condition may be considered a specific learning disability for purposes of designating children with specific learning disabilities;

"(B) regulations which establish and describe diagnostic procedures which shall be used in determining whether a particular child has a disorder or condition which places such child in the category of children with specific learning disabilities; and

"(C) regulations which establish monitoring procedures which will be used to determine if State educational agencies, local educational agencies, and intermediate educational units are complying with the criteria established under clause (A) and clause (B).

"(2) The Commissioner shall submit any proposed regulation written under paragraph (1) to the Committee on Education and Labor of the House of Representatives and the Committee on Labor and Public Welfare of the Senate, for review and comment by each such

committee, at least fifteen days before such regulation is published in the Federal Register.

"(3) If the Commissioner determines, as a result of the promulgation of regulations under paragraph (1), that changes are necessary in the definition of the term 'children with specific learning disabilities', as such term is defined by section 602(15) of the Act [20 USCS § 1401], he shall submit recommendations for legislation with respect to such changes to each House of the Congress.

"(4) For purposes of this subsection [this note]:

"(A) The term 'children with specific learning disabilities' means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or environmental, cultural, or economic disadvantage.

"(B) The term 'Commissioner' means the Commissioner of Education."

Authorization for appropriation. Section 2(e) of Act Nov. 29, 1975, P. L. 94-142, 89 Stat. 774, provided:

"Notwithstanding the provisions of section 611 of the Act [note to this section], as in effect during the fiscal years 1976 and 1977, there are authorized to be appropriated \$100,000,000 for the fiscal year 1976, such sums as may be necessary for the period beginning July 1, 1976, and ending September 30, 1976, and \$200,000,000 for the fiscal year 1977, to carry out the provisions of part B of the Act [20 USCS §§ 1411 et seq.], as in effect during such fiscal years."

Effective date of 1978 amendment. Act Nov. 1, 1978, P. L. 95-561, Title XIII, Part D, § 1341(b), 92 Stat. 2364, provided that: "The amendments made by subsection (a) of this section shall take effect with respect to determinations made in fiscal year 1979 and thereafter."

CROSS REFERENCES

This section is referred to in 20 USCS § 1412.

CODE OF FEDERAL REGULATIONS

Add:

45 CFR Part 121.

45 CFR Part 121a.

Delete:

45 CFR Part 100c.1 et seq.

RESEARCH GUIDE

Law Review Articles:

Krass, The Right to Public Education for Handicapped Children: A Primer for the New Advocate. 1976 U Ill L F 1016.

§ 1412. Eligibility

[*Caution:* For fiscal years 1975, 1976, and 1977 see Other provisions note below]

In order to qualify for assistance under this part [20 USCS §§ 1411 et seq.] in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 613(b) [20 USCS § 1413(b)] in effect prior to the date of the enactment of the Education for All Handicapped Children Act of 1975 [Nov. 29, 1975] and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 617(c) [20 USCS § 1417(c)]; and

(E) the amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Commissioner.

(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and

such program shall be established, reviewed, and revised as provided in section 614(a)(5) [20 USCS § 1414(a)(5)].

(5) The State has established (A) procedural safeguards as required by section 615 [20 USCS § 1415]; (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this part [20 USCS §§ 1411 et seq.] are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 613 [20 USCS § 1413].

(Apr. 13, 1970, P. L. 91-230, Title VI, Part B, § 612, 84 Stat. 178; June 23, 1972, P. L. 92-318, Title IV, Part B, § 421(b)(1)(C), 86 Stat. 341; Aug. 21, 1974, P. L. 93-380, Title VI, Part B, §§ 614(b), (f)(1), 615(a), Title VIII, Part D, § 843(b), 88 Stat. 581, 582, 611; Nov. 29, 1975, P. L. 94-142, §§ 2(a)(4), (c), (d), 5(a), 89 Stat. 773, 774, 780.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1972. Act June 23, 1972, in subsec. (a)(1)(B), substituted "1973" for "1972".

1974. Act Aug. 21, 1974, § 614(b), reenacted this section in its entirety, "Effective for fiscal year 1975 only" and is set out as "Other provisions note below.

Section 614(f)(1) of Act Aug. 21, 1974, in subsec. (a)(1)(B), substituted "1977" for "1973"; and

Section 615(a)(1) of Act Aug. 21, 1974, in subsec. (a)(2), substituted "\$300,000" for "\$200,000"; and

Section 615(a)(2) of Act Aug. 21, 1974, is subsec. (a), added paragraph (3); and

Section 843(b) of Act Aug. 21, 1974, in subsec. (a), paragraph (1), substituted "1 per centum" for "3 per centum", in clause (A), deleted "Puerto Rico," preceding "Guam," and in paragraph (2), deleted "the Commonwealth of Puerto Rico," preceding "Guam,".

1975. Section 2(a)(4), (c), of Act Nov. 29, 1975, amended this section, effective July 1, 1975 as provided by § 2(a) of the Act, as in effect during the fiscal years 1976 and 1977 as follows: In subsec. (a), substituted "years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977" for "year ending June 30, 1975", and substituted "preceding fiscal year" for "fiscal year 1974", and inserted in para. (4), " , or \$300,000, whichever is greater".

Section 2(d) of Act Nov. 29, 1975, effective on the date of enactment [enacted Nov. 29, 1975] as provided by § 8(b) of the Act, amended this section, as in effect during the fiscal years 1976 and 1977, by adding subsec. (d).

Section 5(a) of Act Nov. 29, 1975, effective on October 1, 1977 except for clauses (A), (C), (D) and (E) of paragraph (2) which are effective on the date of enactment [enacted Nov. 29, 1975] as provided by § 8(a) of the Act, substituted this section for former section that read:

"(a)(1) There is hereby authorized to be appropriated for each fiscal year for the purposes of this paragraph an amount equal to not more than 1 per centum of the amount appropriated for such year for payments to States under section 611(b). The Commissioner shall allot the amount appropriated pursuant to this paragraph among—

"(A) Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands, according to their respective needs, and

"(B) for each fiscal year ending prior to July 1, 1977, the Secretary of the Interior, according to the need for such assistance for the education of handicapped children on reservations serviced by elementary and secondary schools operated for Indian children by the Department of the Interior and the terms upon which payments for such purposes shall be made to the Secretary of the Interior shall be determined pursuant to such criteria as the Commissioner determines will best carry out the purposes of this part.

"(2) From the total amount appropriated pursuant to section 611(b) for any fiscal year the Commissioner shall allot to each State an amount which bears the same ratio to such amount as the number

of children aged three to twenty-one, inclusive, in the State bears to the number of such children in all the States, except that no State shall be allotted less than \$300,000 or three-tenths of 1 per centum of such amount available for allotment to the States, whichever is greater. For purposes of this paragraph and subsection (b), the term "State" shall not include Guam, American Samoa, the Virgin Islands, or the Trust Territory of the Pacific Islands.

"(3) No State shall, in any fiscal year, be required to expend amounts allotted pursuant to this section to carry out the provisions of paragraph (1) of section 613(b) unless that State receives an amount greater than the amount allotted to that State for the fiscal year ending June 30, 1973. bears to the number of such children in all the States, except that no State shall be allotted less than \$200,000 or three-tenth of 1 per centum of such amount available for allotment to the States, whichever is greater. For purposes of this paragraph and subsection (b), the term "State" shall not include the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, or the Trust Territory of the Pacific Islands.

"(b) The number of children aged three to twenty-one, inclusive, in any State and in all the States shall be determined, for purposes of this section, by the Commissioner on the basis of the most recent satisfactory data available to him.

"(c) The amount of any State's allotment under subsection (a) for any fiscal year which the Commissioner determines will not be required for that year shall be available for reallocation, from time to time and on such dates during such year as the Commissioner may fix, to other States in proportion to the original allotments to such States under subsection (a) for that year, but with such proportionate amount for any of such other States being reduced to the extent it exceeds the sum the Commissioner estimates such State needs and will be able to use for such year; and the total of such reductions shall be similarly reallocated among the States whose proportionate amounts were not so reduced. Any amount reallocated to a State under this subsection during a year shall be deemed part of its allotment under subsection (a) for that year."

Effective dates:

Section 614(b) of Act Aug. 21, 1974, as amended by Act Nov. 29, 1975, P. L. 94-142, § 2(b)(2), 89 Stat. 773, provided that the reenactment of this section is "Effective for the fiscal years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977, only."

Section 614(f)(2) of Act Aug. 21, 1974, provided that the amendment made by § 614(f)(1) of that Act "shall be effective on and after July 1, 1973." Section 2(c)(2) of Act Aug. 21, 1974, provided "In any case where the effective date for an amendment made by this Act is expressly stated to be effective after June 30, 1973, or on July 1, 1973, such amendment shall be deemed to have been enacted on June 30, 1973."

Section 615(a)(1) of Act Aug. 21, 1974, provided that the amendment made by that section will be "Effective on and after July 1, 1975,". Section 615(d) of Act Aug. 21, 1974, provided that the amendments made by § 615(a)(1) of that Act "shall be effective in any fiscal year for which the aggregate of the amounts allotted to the States for that fiscal year for carrying out part B of the Education of the Handicapped Act [20 USCS §§ 1411-1414] is \$45,000,000 or more."

Section 615(a)(2) of Act Aug. 21, 1974, provided that the amendment made by that section will be "Effective on and after July 1, 1975,". Section 843(b) of Act Aug. 21, 1974, provided that the amendments made by that section will be "Effective after June 30, 1975,"

For effective dates of 1975 amendments made by Act Nov. 29, 1975 see effective dates notes to 20 USCS § 1411.

Other provisions:

Section 1412 of Title 20 for the fiscal years 1975, 1976, and 1977. Section 614(b) of Act Aug. 21, 1974, P. L. 93-380, Title VI, Part B, 88 Stat. 581, as amended by Act Nov. 29, 1975, P. L. 94-142, § 2(b)(2), 89 Stat. 773, provided that "Effective for the fiscal years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977, only, section 612 of the Education of the Handicapped Act [20 USCS § 1412] is amended to read as follows:

"ALLOCATIONS OF APPROPRIATIONS"

"Sec. 612. [§ 1412] (a) Sums appropriated for the fiscal years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977 shall be made available to States and allocated to each State, on the basis of unsatisfied entitlements under section 611, in an amount equal to the amount it received from the appropriation for this part for the preceding fiscal year, or \$300,000, whichever is greater.

"(b) Any sums appropriated to carry out this part for any fiscal year which remain after allocations under subsection (a) of this section shall be made to States in accordance with entitlements created under section 611 [20 USCS § 1411] (to the extent that such entitlements are unsatisfied) ratably reduced.

"(c) In the event that funds become available for making payments under this part for any fiscal year after allocations have been made under subsections (a) and (b) for that year, the amounts reduced under subsection (b) shall be increased on the same basis as they were reduced."

"(d) The Commissioner shall, no later than one hundred twenty days after the date of the enactment of the Education for All Handicapped Children Act of 1975 [enacted Nov. 29, 1975], prescribe and publish in the Federal Register such rules as he considers necessary to carry out the provisions of this section and section 611 [20 USCS § 1411]."

Limitation on application of subsec. (a)(2) of 20 USCS § 1412. Section 615(d) of Act. Aug. 21, 1974, P. L. 93-380, Title VI, Part B, 88 Stat. 583, provided that the amendment made by section 615(a)(1) of that Act of substituting "\$300,000" for "\$200,000" in 20 USCS § 1412(a)(2)

"shall be effective in any fiscal year for which the aggregate of the amounts allotted to the States for that fiscal year for carrying out part B of the Education of the Handicapped Act [20 USCS §§ 1411 et seq.] is \$45,000,000 or more."

Fiscal year transition. Act Apr. 21, 1976, P. L. 94-274, Title II, § 205(8), 90 Stat. 394, provided that for the purposes of this section, "The period of July 1, 1976, through September 30, 1976, shall be treated as part of the fiscal year beginning October 1, 1976".

CODE OF FEDERAL REGULATIONS

Add:

45 CFR Part 104.

45 CFR Part 116b.

45 CFR Part 121.

45 CFR Part 121a.

§ 1413. State plans

[Caution: For fiscal years 1975, 1976, and 1977 see Other provisions note below]

(a) Any State meeting the eligibility requirements set forth in section 612 [20 USCS § 1412] and desiring to participate in the program under this part shall submit to the Commissioner, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as he deems necessary. Each such plan shall—

(1) set forth policies and procedures designed to assure that funds paid to the State under this part will be expended in accordance with the provisions of this part, with particular attention given to the provisions of sections 611(b), 611(c), 611(d), 612(2), and 612(3) [20 USCS §§ 1411(b)–(d), 1412(2), (3)];

(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal program, including section 121 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241c-2), section 305(b)(8) of such Act (20 U.S.C. 844a(b)(8)) or its successor authority, and section 122(a)(4)(B) of the Vocational Education Act of 1963 (20 U.S.C. 1262(a)(4)(B)), under which there is specific authority for the provision of assistance for the education of handicapped children, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all handicapped children, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

(3) set forth, consistent with the purposes of this Act [20 USCS §§ 1401 et seq.], a description of programs and procedures for (A) the development and implementation of a comprehensive system of personnel development which shall include the inservice training of general and special educational instructional and support personnel, detailed procedures to assure that all personnel necessary to carry out the purposes of this Act [20 USCS §§ 1401 et seq.] are appropriately and adequately prepared and trained, and effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and (B) adopting, where appropriate, promising educational practices and materials development through such projects;

- (4) set forth policies and procedures to assure—
- (A) that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this part by providing for such children special education and related services; and
- (B) that (i) handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized educational program as required by this part [20 USCS §§ 1411 et seq.]) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this part [20 USCS §§ 1411 et seq.] or any other applicable law requiring the provision of special education and related services to all handicapped children within such State, and (ii) in all such instances the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;
- (5) set forth policies and procedures which assure that the State shall seek to recover any funds made available under this part [20 USCS §§ 1411 et seq.] for services to any child who is determined to be erroneously classified as eligible to be counted under section 611(a) or section 611(d) [20 USCS § 1411(a) or (d)];
- (6) provide satisfactory assurance that the control of funds provided under this part [20 USCS §§ 1411 et seq.], and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this part [20 USCS §§ 1411 et seq.], and that a public agency will administer such funds and property;
- (7) provide for (A) making such reports in such form and containing such information as the Commissioner may require to carry out his functions under this part [20 USCS §§ 1411 et seq.], and (B) keeping such records and affording such access thereto as the Commissioner may find necessary to assure the correctness and verification of such reports and proper disbursement of Federal funds under this part [20 USCS §§ 1411 et seq.];
- (8) provide procedures to assure that final action with respect to any application submitted by a local educational agency or an intermediate educational unit shall not be taken without first affording the local educational agency or intermediate educational unit involved reasonable notice and opportunity for a hearing;
- (9) provide satisfactory assurance that Federal funds made available under this part [20 USCS §§ 1411 et seq.] (A) will not be commingled with State funds, and (B) will be so used as to supplement and increase

the level of State and local funds expended for the education of handicapped children and in no case to supplant such State and local funds, except that, where the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Commissioner may waive in part the requirement of this clause if he concurs with the evidence provided by the State;

(10) provide, consistent with procedures prescribed pursuant to section 617(a)(2) [20 USCS § 1417(a)(2)], satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this part to the State, including any such funds paid by the State to local educational agencies and intermediate educational units;

(11) provide for procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children (including evaluation of individualized education programs), in accordance with such criteria that the Commissioner shall prescribe pursuant to section 617 [20 USCS § 1417]; and

(12) provide that the State has an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in or concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education officials, and administrators of programs for handicapped children, which (A) advises the State educational agency of unmet needs within the State in the education of handicapped children, (B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of handicapped children and the procedures for distribution of funds under this part [20 USCS §§ 1411 et seq.], and (C) assists the State in developing and reporting such data and evaluations as may assist the Commissioner in the performance of his responsibilities under section 618 [20 USCS § 1418].

(b) Whenever a State educational agency provides free appropriate public education for handicapped children, or provides direct services to such children, such State educational agency shall include, as part of the State plan required by subsection (a) of this section, such additional assurances not specified in such subsection (a) as are contained in section 614(a) [20 USCS § 1414(a)], except that funds available for the provision of such education or services may be expended without regard to the provisions relating to excess costs in section 614(a) [20 USCS § 1414(a)].

(c) The Commissioner shall approve any State plan and any modification thereof which—

- (1) is submitted by a State eligible in accordance with section 612; and
- (2) meets the requirements of subsection (a) and subsection (b).

The Commissioner shall disapprove any State plan which does not meet the requirements of the preceding sentence, but shall not finally disapprove a State plan except after reasonable notice and opportunity for a hearing to the State.

(Apr. 13, 1970, P. L. 91-230, Title VI, Part B, § 613, 84 Stat. 179; Aug. 21, 1974, P. L. 93-380, Title VI, Part B, §§ 614(c), (d), 615(b), (c), Title VIII, Part D, § 843(b)(2), 88 Stat. 581, 583, 611; Nov. 29, 1975, P. L. 94-142, §§ 2(b)(3), 5(a), 89 Stat. 774, 782.)

CODE OF FEDERAL REGULATIONS

Grants to states for the education of handicapped children, 45 CFR 121.1 et seq.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1974. Act Aug. 21, 1973, § 614(c), in subsec. (a), in the preamble, substituted "is entitled to receive payments" for "desires to receive grants", effective for fiscal year 1975.

Section 843(b)(2) of Act Aug. 21, 1974, in subsec. (a)(1), deleted "the Commonwealth of Puerto Rico," preceding "Guam," effective after June 30, 1975.

Section 614(d) of Act Aug. 21, 1974, in subsec. (a), paragraph, (10) deleted "and" from the end, in paragraph (11), substituted a semicolon for the period at the end, and added paragraphs (12) and (13).

Section 615(b) of Act Aug. 21, 1974, in subsec. (a)(1), substituted "\$200,000" for "\$100,000".

Section 615(c)(1) of Act Aug. 21, 1974, redesignated subsecs. (b), (c), and (d), and all references thereto as subsecs. (c), (d), and (e), respectively, and added a new subsec. (b).

Section 615(c)(2), in subsec. (e)(1), as redesignated, substituted "subsection (d)" for "subsection (c)".

1975. Section 5(a) of Act Nov. 29, 1975, effective October 1, 1977, as provided by § 8(a) of the Act, substituted this section for former section as it was in effect for the fiscal years 1975, 1976, and 1977; see Other provisions note below for text of section.

Effective dates:

Section 614(c) of Act Aug. 21, 1974, as amended by Act Nov. 29, 1975, P. L. 94-142, § 2(b)(3), 89 Stat. 774, provided that the amendment made by that section is "Effective for the fiscal years ending June 30, 1975 and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977, only".

Section 843(b)(2) of Act Aug. 21, 1974, provided that the amendment made by that section is "Effective after June 30, 1975".

Section 2(c)(1) of Act Aug. 21, 1974, provided that the amendments made by §§ 614(d), 615(c)(1), (2) of that Act "shall be effective on and

after-the-sixtieth day after the enactment of this Act [enacted Aug. 21, 1974]."

Section 615(d) of Act Aug. 21, 1974, provided that the amendment made by § 615(b) of that Act "shall be effective in any fiscal year for which the aggregate of the amounts allotted to the States for that fiscal year for carrying out part B of the Education of the Handicapped Act [20 USCS §§ 1411 et seq.] is \$45,000,000 or more."

For effective dates of 1975 amendments made by Act Nov. 29, 1975 see effective dates notes to 20 USCS § 1411.

Other provisions:

Limitation on application of subsec. (a)(1) of 20 USCS § 1413. Section 615(d) of Act Aug. 21, 1974, P. L. 93-380, Title VI, Part B, 88 Stat. 583, provided that the amendment made by section 615(b) of that Act of substituting "\$200,000" for "\$100,000" in 20 USCS § 1413 "shall be effective in any fiscal year for which the aggregate of the amounts allotted to the States for that fiscal year for carrying out Part B of the Education of the Handicapped Act [20 USCS §§ 1411 et seq.] is \$45,000,000 or more."

Section 1413 of Title 20 for the fiscal years 1975, 1976, and 1977. Section 1413, as in effect for the fiscal years 1975, 1976, and 1977, read as follows:

"Sec. 613. [§ 1413] (a) Any State which is entitled to receive payments under this part [20 USCS §§ 1411 et seq.] shall submit to the Commissioner through its State educational agency a State plan (not part of any other plan) in such detail as the Commissioner deems necessary. Such State plan shall—

"(1) set forth such policies and procedures as will provide satisfactory assurance that funds paid to the State under this part [20 USCS §§ 1411 et seq.] will be expended (A) either directly or through individual, or combinations of, local educational agencies, solely to initiate, expand, or improve programs and projects, including preschool programs and projects, (i) which are designed to meet the special educational and related needs of handicapped children throughout the State, and (ii) which are of sufficient size, scope, and quality (taking into consideration the special educational needs of such children) as to give reasonable promise of substantial progress toward meeting those needs, and (B) for the proper and efficient administration of the State plan (including State leadership activities and consultative services), and for planning on the State and local level: Provided, That the amount expended for such administration and planning shall not exceed 5 per centum of the amount allotted to the State for any fiscal year or \$200,000 (\$35,000 in the case of Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands), whichever is greater;

"(2) provide satisfactory assurance that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision will be made for participation of such children in programs assisted or carried out under this part [20 USCS §§ 1411 et seq.];

"(3) provide satisfactory assurance that the control of funds provided under this part [20 USCS §§ 1411 et seq.], and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this part [20 USCS §§ 1411 et seq.], and that a public agency will administer such funds and property;

"(4) set forth policies and procedures which provide satisfactory assurance that Federal funds made available under this part [20 USCS §§ 1411 et seq.] will be so used as to supplement and, to the extent practical, increase the level of State, local, and private funds expended for the education of handicapped children, and in no case supplant such State, local and private funds;

"(5) provide that effective procedures, including provision for appropriate objective measurements of educational achievement, will be adopted for evaluating at least annually the effectiveness of the programs in meeting the special educational needs of, and providing related services for, handicapped children;

"(6) provide that the State educational agency will be the sole agency for administering or supervising the administration of the plan;

"(7) provide for (A) making such reports, in such form and containing such information, as the Commissioner may require to carry out his functions under this part [20 USCS §§ 1411 et seq.], including reports of the objective measurements required by clause (5) of this subsection, and (B) keeping such records and for affording such access thereto as the Commissioner may find necessary to assure the correctness and verification of such reports and proper disbursement of Federal funds under this part [20 USCS §§ 1411 et seq.];

"(8) provide satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this part [20 USCS §§ 1411 et seq.] to the State, including any such funds paid by the State to local educational agencies;

"(9) provide satisfactory assurance that funds paid to the State under this part [20 USCS §§ 1411 et seq.] shall not be made available for handicapped children eligible for assistance under section 103(a)(5) of title I of the Elementary and Secondary Education Act of 1965 [20 USCS § 241c(a)(5)];

"(10) provide satisfactory assurance that effective procedures will be adopted for acquiring and disseminating to teachers of, and administrators of programs for, handicapped children significant information derived from educational research, demonstration, and similar projects, and for adopting, where appropriate, promising educational practices developed through such projects;

"(11) contain a statement of policies and procedures which will be designed to insure that all educational programs for the handicapped in the State will be properly coordinated by the persons in charge of special education programs for handicapped children in the State educational agency;

"(12)(A) establish a goal of providing full educational opportunities

to all handicapped children, and (B) provide for a procedure to assure that funds expended under this part are used to accomplish the goal set forth in (A) of this paragraph and priority in the utilization of funds under this part will be given to handicapped children who are not receiving an education; and

"(13) provide procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation and educational placement of handicapped children including, but not limited to (A)(i) prior notice to parents or guardians of the child when the local or State educational agency proposes to change the educational placement of the child, (ii) an opportunity for the parents or guardians to obtain an impartial due process hearing, examine all relevant records with respect to the classification or educational placement of the child, and obtain an independent educational evaluation of the child, (iii) procedures to protect the rights of the child when the parents or guardians are not known, unavailable, or the child is a ward of the State including the assignment of an individual (not to be an employee of the State or local educational agency involved in the education or care of children) to act as a surrogate for the parents or guardians, and (iv) provision to insure that the decisions rendered in the impartial due process hearing required by this paragraph shall be binding on all parties subject only to appropriate administrative or judicial appeal; and (B) procedures to insure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily; and (C) procedures to insure the testing and evaluation materials and procedures utilized for the purposes of classification and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory.

"(b)(1) Any State which desires to receive a grant under this part for any fiscal year beginning after June 30, 1975, shall submit to the Commissioner for approval not later than one year after the enactment of the Education of the Handicapped Amendments of 1974, through its State educational agency an amendment to the State plan required under subsection (a), setting forth in detail the policies and procedures which the State will undertake in order to assure that—

"(A) all children residing in the State who are handicapped regardless of the severity of their handicap and who are in need of special education and related services are identified, located, and evaluated, including a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

"(B) policies and procedures will be established in accordance with detailed criteria prescribed by the Commissioner to protect the confidentiality of such data and information by the State;

"(C) there is established (i) a goal of providing full educational opportunities to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal; and

"(D) the amendment submitted by the State pursuant to this subsection shall be available to parents and other members of the general public at least thirty days prior to the date of submission of the amendment to the Commissioner.

For the purpose of this part, any amendment to the State plan required by this subsection and approved by the Commissioner shall be considered, after June 30, 1975, as a required portion of the State plan.

"(2) The requirement of paragraph (1) of this subsection shall not be effective with respect to any fiscal year in which the aggregate of the amounts allotted to the States for this part for that fiscal year is less than \$45,000,000.

"(c) The Commissioner shall approve any State plan which he determines meets the requirements and purposes of this part [20 USCS §§ 1411-1414].

"(d)(1) The Commissioner shall not approve any State plan pursuant to this section for any fiscal year unless the plan has, prior to its submission, been made public as a separate document by the State educational agency and a reasonable opportunity has been given by that agency for comment thereon by interested persons (as defined by regulation). The State educational agency shall make public the plan as finally approved. The Commissioner shall not finally disapprove any plan submitted under this section or any modification thereof, without first affording the State educational agency submitting the plan reasonable notice and opportunity for a hearing.

"(2) Whenever the Commissioner, after reasonable notice and opportunity for hearing to such State agency, finds—

"(A) that the State plan has been so changed that it no longer complies with the provisions of this part [20 USCS §§ 1411 et seq.], or

"(B) that in the administration of the plan there is a failure to comply substantially with any such provision or with any requirements set forth in the application of a local educational agency approved pursuant to such plan,

the Commissioner shall notify the agency that the further payments will not be made to the State under this part [20 USCS §§ 1411 et seq.] (or in his discretion, that further payments to the State will be limited to programs or projects under the State plan, or portions thereof, not affected by the failure, or that the State educational agency shall not make further payments under this part [20 USCS §§ 1411 et seq.] to specified local agencies affected to the failure) until he is so satisfied, the Commissioner shall make no further

payments to the State under this part [20 USCS §§ 1411 et seq.] (or shall limit payments to programs or projects under, or parts of, the State plan not affected by the failure, or payments by the State educational agency under this part [20 USCS §§ 1411 et seq.] shall be limited to local educational agencies not affected by the failure, as the case may be).

"(e)(1) If any State is dissatisfied with the Commissioner's final action, with respect to the approval of its State plan submitted under subsection (a) or with his final action under subsection (d), such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit of which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Commissioner. The Commissioner thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28, United States Code [28 USCS § 2112].

"(2) The findings of fact by the Commissioner, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Commissioner to take further evidence, and the Commissioner may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

"(3) The court shall have jurisdiction to affirm the action of the Commissioner or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code [28 USCS § 1254]."

CODE OF FEDERAL REGULATIONS

Indirect costs under certain programs, 45 CFR 100c.1 et seq.
Grants to states for the education of handicapped children, 45 CFR 121.1 et seq.

45 CFR Part 116b.

45 CFR Part 121a.

§ 1414. Application

[Caution: For fiscal years 1976 and 1977 see Other provisions note below]

(a) A local educational agency or an intermediate educational unit which desires to receive payments under section 611(d) [20 USCS § 1411(d)] for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall—

(1) provide satisfactory assurance that payments under this part [20 USCS §§ 1411 et seq.] will be used for excess costs directly attributable to programs which—

(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are handicapped, regardless of the severity of their handicap, and are in

need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

(B) establish policies and procedures in accordance with detailed criteria prescribed under section 617(c) [20 USCS § 1417(c)];

(C) establish a goal of providing full educational opportunities to all handicapped children, including—

(i) procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under section 613(a)(3) [20 USCS § 1413(a)(3)];

(ii) the provision of, and the establishment of priorities for providing, a free appropriate public education to all handicapped children, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education;

(iii) the participation and consultation of the parents or guardian of such children; and

(iv) to the maximum extent practicable and consistent with the provisions of section 612(5)(B) [20 USCS § 1412(5)(B)], the provision of special services to enable such children to participate in regular educational programs;

(D) establish a detailed timetable for accomplishing the goal described in subclause (C); and

(E) provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal described in subclause (C);

(2) provide satisfactory assurance that (A) the control of funds provided under this part [20 USCS §§ 1411 et seq.], and title to property derived from such funds, shall be in a public agency for the uses and purposes provided in this part [20 USCS §§ 1411 et seq.] and that a public agency will administer such funds and property, (B) Federal funds expended by local educational agencies and intermediate educational units for programs under this part [20 USCS §§ 1411 et seq.] (i) shall be used to pay only the excess costs directly attributable to the education of handicapped children, and (ii) shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant such State and local funds, and (C) State and local funds will be used in the jurisdiction of the local educational agency or intermediate educational unit to provide services in program areas which, taken as a whole, are at least comparable to services being provided in areas of such

jurisdiction which are not receiving funds under this part [20 USCS §§ 1411 et seq.];

(3)(A) provide for furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives), as may be necessary to enable the State educational agency to perform its duties under this part [20 USCS §§ 1411 et seq.], including information relating to the educational achievement of handicapped children participating in programs carried out under this part; and

(B) provide for keeping such records, and provide for affording such access to such records, as the State educational agency may find necessary to assure the correctness and verification of such information furnished under subclause (A);

(4) provide for making the application and all pertinent documents related to such application available to parents, guardians, and other members of the general public, and provide that all evaluations and reports required under clause (3) shall be public information;

(5) provide assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually;

(6) provide satisfactory assurance that policies and programs established and administered by the local educational agency or intermediate educational unit shall be consistent with the provisions of paragraph (1) through paragraph (7) of section 612 [20 USCS § 1412(1)-(7)] and section 613(a) [20 USCS § 1413(a)]; and

(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 612(5)(B), 612(5)(C), and 615 [20 USCS §§ 1412(5)(B), (C) and 1415].

(b)(1) A State educational agency shall approve any application submitted by a local educational agency or an intermediate educational unit under subsection (a) if the State educational agency determines that such application meets the requirements of subsection (a), except that no such application may be approved until the State plan submitted by such State educational agency under subsection (a) is approved by the Commissioner under section 613(c) [20 USCS § 1413(c)]. A State educational agency shall disapprove any application submitted by a local educational agency or an intermediate educational unit under subsection (a) if the State educational agency determines that such application does not meet the requirements of subsection (a).

(2)(A) Whenever a State educational agency, after reasonable notice and opportunity for a hearing, finds that a local educational agency or an intermediate educational unit, in the administration of an application

approved by the State educational agency under paragraph (1), has failed to comply with any requirement set forth in such application, the State educational agency, after giving appropriate notice to the local educational agency or the intermediate educational unit, shall—

(i) make no further payments to such local educational agency or such intermediate educational unit under section 620 [20 USCS § 1420] until the State educational agency is satisfied that there is no longer any failure to comply with the requirement involved; or

(ii) take such finding into account in its review of any application made by such local educational agency or such intermediate educational unit under subsection (a).

(B) The provisions of the last sentence of section 616(a) [20 USCS § 1416(a)] shall apply to any local educational agency or any intermediate educational unit receiving any notification from a State educational agency under this paragraph.

(3) In carrying out its functions under paragraph (1), each State educational agency shall consider any decision made pursuant to a hearing held under section 615 [20 USCS § 1415] which is adverse to the local educational agency or intermediate educational unit involved in such decision.

(c)(1) A State educational agency may, for purposes of the consideration and approval of applications under this section, require local educational agencies to submit a consolidated application for payments if such State educational agency determines that any individual application submitted by any such local educational agency will be disapproved because such local educational agency is ineligible to receive payments because of the application of section 611(c)(4) [20 USCS § 1411(c)(4)] (A)(i) or such local educational agency would be unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

(2)(A) In any case in which a consolidated application of local educational agencies is approved by a State educational agency under paragraph (1), the payments which such local educational agencies may receive shall be equal to the sum of payments to which each such local educational agency would be entitled under section 611(d) [20 USCS § 1411(d)] if an individual application of any such local educational agency had been approved.

(B) The State educational agency shall prescribe rules and regulations with respect to consolidated applications submitted under this subsection which are consistent with the provisions of paragraph (1) through paragraph (7) of section 612 and section 613(a) [20 USCS §§ 1412(1)–(7) and 1413] and which provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this part [20 USCS §§ 1411 et seq.].

(C) In any case in which an intermediate educational unit is required pursuant to State law to carry out the provisions of this part [20 USCS §§ 1411 et seq.], the joint responsibilities given to local educational agencies under subparagraph (B) shall not apply to the administration and disbursement of any payments received by such intermediate educational unit. Such responsibilities shall be carried out exclusively by such intermediate educational unit.

(d) Whenever a State educational agency determines that a local educational agency—

- (1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a);
- (2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or
- (3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this part [20 USCS §§ 1411 et seq.].

(e) Whenever a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by such agency with State and local funds otherwise available to such agency, the State educational agency may reallocate funds (or such portion of those funds as may not be required to provide such education and services) made available to such agency, pursuant to section 611(d) [20 USCS § 1411(d)], to such other local educational agencies within the State as are not adequately providing special education and related services to all handicapped children residing in the areas served by such other local educational agencies.

(f) Notwithstanding the provisions of subsection (a)(2)(B)(ii), any local educational agency which is required to carry out any program for the education of handicapped children pursuant to a State law shall be entitled to receive payments under section 611(d) [20 USCS § 1411(d)] for use in carrying out such program, except that such payments may not be used to reduce the level of expenditures for such program made by such local educational agency from State or local funds below the level of such

expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

(Apr. 13, 1970, P. L. 91-230, Title VI, Part B, § 613, 84 Stat. 179; Nov. 29, 1975, P. L. 94-142, § 5(a), 89 Stat. 784.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1975. Section 5(a) of Act Nov. 29, 1975, effective October 1, 1977, as provided by § 8(c) of the Act, substituted this section for former section; see Other provisions note below for text of section prior to its revision.

Effective dates:

This section as reenacted in 1975 becomes effective on October 1, 1977; see effective dates note to 20 USCS § 1411.

Other provisions:

Section 1414 of Title 20 as in effect prior to October 1, 1977. Section 1414 as in effect prior to October 1, 1977 read as follows:

"From the amounts allotted to each State under this part, the Commissioner shall pay to that State an amount equal to the amount expended by the State in carrying out its plan."

CODE OF FEDERAL REGULATIONS

Add:

45 CFR Part 121a.

§ 1415. Procedural safeguards

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this part [20 USCS §§ 1411 et seq.] shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b)(1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

- (i) proposes to initiate or change, or
 - (ii) refuses to initiate or change,
- the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;
- (D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and
- (E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.
- (2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.
- (c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.
- (d) Any party to any hearing conducted pursuant to subsections (b) and (c) shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 613(a)(12) [20 USCS § 1413(a)(12)]).
- (e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) shall be final, except that any party may bring an action under paragraph (2) of this subsection.
- (2) Any party aggrieved by the findings and decision made under subsection (b) who does not have the right to an appeal under subsection (c), and any party aggrieved by the findings and decision under subsection (c), shall have the right to bring a civil action with respect to

the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(Apr. 13, 1970, P. L. 91-230, Title VI, Part B, § 615, as added Nov. 29, 1975, P. L. 94-142, § 5(a), 89 Stat. 788.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective dates:

This section as enacted in 1975 becomes effective on October 1, 1977; see effective dates note to 20 USCS § 1411.

CODE OF FEDERAL REGULATIONS

Add:

45 CFR Part 121a.

RESEARCH GUIDE

Law Review Articles:

Krass, The Right to Public Education for Handicapped Children: A Primer for the New Advocate. 1976 U Ill L F 1016.

§ 1416. Withholding and judicial review

(a) Whenever the Commissioner, after reasonable notice and opportunity for hearing to the State educational agency involved (and to any local educational agency or intermediate educational unit affected by any failure described in clause (2)), finds—

- (1) that there has been a failure to comply substantially with any provision of section 612 or section 613 [20 USCS § 1412 or § 1413], or
- (2) that in the administration of the State plan there is a failure to comply with any provision of this part [20 USCS §§ 1411 et seq.] or with any requirements set forth in the application of a local educational agency or intermediate educational unit approved by the State educational agency pursuant to the State plan,

the Commissioner (A) shall, after notifying the State educational agency, withhold any further payments to the State under this part [20 USCS §§ 1411 et seq.], and (B) may, after notifying the State educational agency, withhold further payments to the State under the Federal programs specified in section 613(a)(2) [20 USCS § 1413(a)(2)] within his jurisdiction, to the extent that funds under such programs are available for the

provision of assistance for the education of handicapped children. If the Commissioner withholds further payments under clause (A) or clause (B) he may determine that such withholding will be limited to programs or projects under the State plan, or portions thereof, affected by the failure, or that the State educational agency shall not make further payments under this part [20 USCS §§ 1411 et seq.] to specified local educational agencies or intermediate educational units affected by the failure. Until the Commissioner is satisfied that there is no longer any failure to comply with the provisions of this part [20 USCS §§ 1411 et seq.], as specified in clause (1) or clause (2), no further payments shall be made to the State under this part [20 USCS §§ 1411 et seq.] or under the Federal programs specified in section 613(a)(2) [20 USCS § 1413(a)(2)] within his jurisdiction to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children, or payments by the State educational agency under this part [20 USCS §§ 1411 et seq.] shall be limited to local educational agencies and intermediate educational units whose actions did not cause or were not involved in the failure, as the case may be. Any State educational agency, local educational agency, or intermediate educational unit in receipt of a notice pursuant to the first sentence of this subsection shall, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this subsection to the attention of the public within the jurisdiction of such agency or unit.

(b)(1) If any State is dissatisfied with the Commissioner's final action with respect to its State plan submitted under section 613 [20 USCS § 1413], such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Commissioner. The Commissioner thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28, United States Code.

(2) The findings of fact by the Commissioner, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Commissioner to take further evidence, and the Commissioner may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(3) Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Commissioner or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(Apr. 13, 1970, P. L. 91-230, Title VI, Part B, § 616, as added Nov. 29, 1975, P. L. 94-142, § 5(a), 89 Stat. 789.)

FINAL REGULATIONS UNDER P.L. 94-142

45 C.F.R. Part 121a*

*With the organization of the new U.S. Department of Education, all regulations concerning education have been recodified. These regulations now appear at 34 C.F.R. Part 300. See 45 FEDERAL REGISTER 77368 (November 21, 1980)

PART 121a—ASSISTANCE TO STATES FOR EDUCATION OF HANDI- CAPPED CHILDREN

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AUTHORITY: Part of the Education of the Handicapped Act, Pub. L. 91-230, Title VI, as amended, 89 Stat. 776-794 (20 U.S.C. 1411-1420) unless otherwise noted.

SOURCE: 42 FR 42476, Aug. 23, 1977, unless otherwise noted.

Subpart A—General

PURPOSE, APPLICABILITY, AND GENERAL PROVISIONS REGULATIONS

§ 121a.1 Purpose.

The purpose of this part is:

- (a) To insure that all handicapped children have available to them a free appropriate public education which includes special education and related services to meet their unique needs,
- (b) To insure that the rights of handicapped children and their parents are protected,
- (c) To assist States and localities to provide for the education of all handicapped children, and
- (d) To assess and insure the effectiveness of efforts to educate those children.

(20 U.S.C. 1401 Note)

§ 121a.2 Applicability to State, local, and private agencies.

(a) *States.* This part applies to each State which receives payments under Part B of the Education of the Handicapped Act.

(b) *Public agencies within the State.* The annual program plan is submitted by the State educational agency on behalf of the State as a whole. There-

fore, the provisions of this part apply to all political subdivisions of the State that are involved in the education of handicapped children. These would include: (1) The State educational agency, (2) local educational agencies and intermediate educational units, (3) other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for the deaf or blind), and (4) State correctional facilities.

(c) *Private schools and facilities.* Each public agency in the State is responsible for insuring that the rights and protections under this part are given to children referred to or placed in private schools and facilities by that public agency.

(See §§ 121a.400-121a.403)

(20 U.S.C. 1412(1), (6); 1413(a); 1413(a)(4)(B))

Comment. The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

§ 121a.3 General provisions regulations.

Assistance under Part B of the Act is subject to Parts 100, 100b, 100c, and 121 of this chapter, which include definitions and requirements relating to fiscal, administrative, property management, and other matters.

(20 U.S.C. 1414(b))

DEFINITIONS

Comment. Definitions of terms that are used throughout these regulations are included in this subpart. Other terms are defined in the specific subparts in which they are used. Below is a list of those terms and the specific sections and subparts in which they are defined:

- Consent (Section 121a.500 of Subpart E)
- Destruction (Section 121a.560 of Subpart E)
- Direct services (Section 121a.370(b)(1) of Subpart C)
- Evaluation (Section 121a.500 of Subpart E)
- First priority children (Section 121a.320(a) of Subpart C)
- Independent educational evaluation (Section 121a.503 of Subpart E)
- Individualized education program (Section 121a.340 of Subpart C)
- Participating agency (Section 121a.560 of Subpart E)

Personally identifiable (Section 121a.500 of Subpart E)
 Private school handicapped children (Section 121a.450 of Subpart D)
 Public expense (Section 121a.503 of Subpart E)
 Second priority children (Section 121a.320(b) of Subpart C)
 Special definition of "State" (Section 121a.700 of Subpart G)
 Support services (Section 121a.370(b)(2) of Subpart C)

§ 121a.4 Free appropriate public education.

As used in this part, the term "free appropriate public education" means special education and related services which:

- (a) Are provided at public expense, under public supervision and direction, and without charge.
- (b) Meet the standards of the State educational agency, including the requirements of this part.
- (c) Include preschool, elementary school, or secondary school education in the State involved, and
- (d) Are provided in conformity with an individualized education program which meets the requirements under §§ 121a.340-121a.349 of Subpart C.

(20 U.S.C. 1401(18))

§ 121a.5 Handicapped children.

(a) As used in this part, the term "handicapped children" means those children evaluated in accordance with §§ 121a.530-121a.534 as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who because of those impairments need special education and related services.

(b) The terms used in this definition are defined as follows:

(1) "Deaf" means a hearing impairment which is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects educational performance.

(2) "Deaf-blind" means concomitant hearing and visual impairments, the combination of which causes such severe communication and other de-

velopmental and educational problems that they cannot be accommodated in special education programs solely for deaf or blind children.

(3) "Hard of Hearing" means a hearing impairment, whether permanent or fluctuating, which adversely affects a child's educational performance but which is not included under the definition of "deaf" in this section.

(4) "Mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affects a child's educational performance.

(5) "Multihandicapped" means concomitant impairments (such as mentally retarded-blind, mentally retarded-orthopedically impaired, etc.), the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blind children.

(6) "Orthopedically impaired" means a severe orthopedic impairment which adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g., poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns which cause contractures).

(7) "Other health impaired" means limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, which adversely affects a child's educational performance.

(8) "Seriously emotionally disturbed" is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:

(A) An inability to learn which cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes children who are schizophrenic or autistic. The term does not include children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.

(9) "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain disfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation of emotional disturbance or of environmental, cultural, or economic disadvantage.

(10) "Speech impaired" means a communication disorder such as stuttering, impaired articulation, a language impairment, or a voice impairment, which adversely affects a child's educational performance.

(11) "Visually handicapped" means a visual impairment which, even with correction, adversely affects a child's educational performance. The term includes both partially seeing and blind children.

(20 U.S.C. 1401(1), (15))

[42 FR 42476, Aug. 23, 1977, as amended at 42 FR 65083, Dec. 29, 1977]

§ 121a.6 Include.

As used in this part, the term "include" means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

(20 U.S.C. 1417(b))

§ 121a.7 Intermediate educational unit.

As used in this part, the term "intermediate educational unit" means any public authority, other than a local educational agency, which:

(a) is under the general supervision of a State educational agency;

(b) is established by State law for the purpose of providing free public education on a regional basis; and

(c) Provides special education and related services to handicapped children within that State.

(20 U.S.C. 1401 (22))

§ 121a.8 Local educational agency.

(a) As used in this part, the term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(b) For the purposes of this part, the term "local educational agency" also includes intermediate educational units.

(20 U.S.C. 1401 (8))

§ 121a.9 Native language.

As used in this part, the term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act, which provides as follows:

The term "native language", when used with reference to a person of limited English-speaking ability, means the language normally used by that person, or in the case of a child, the language normally used by the parents of the child.

(20 U.S.C. 880b-1(a)(2); 1401(21))

Comment. Section 602(21) of the Education of the Handicapped Act states that the

term "native language" has the same meaning as the definition from the Bilingual Education Act. (The term is used in the prior notice and evaluation sections under § 121a.505(b)(2) and § 121a.532(a)(1) of Subpart E.) In using the term, the Act does not prevent the following means of communication:

(1) In all direct contact with a child (including evaluation of the child), communication would be in the language normally used by the child and not that of the parents, if there is a difference between the two.

(2) If a person is deaf or blind, or has no written language, the mode of communication would be that normally used by the person (such as sign language, braille, or oral communication).

§ 121a.10 Parent.

As used in this part, the term "parent" means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with § 121a.514. The term does not include the State if the child is a ward of the State.

(20 U.S.C. 1415)

Comment. The term "parent" is defined to include persons acting in the place of a parent, such as a grandmother or stepparent with whom a child lives, as well as persons who are legally responsible for a child's welfare.

§ 121a.11 Public agency.

As used in this part, the term "public agency" includes the State educational agency, local educational agencies, intermediate educational units, and any other political subdivision of the State which are responsible for providing education to handicapped children.

(20 U.S.C. 1412(2)(B); 1412(6); 1413(a))

§ 121a.12 Qualified.

As used in this part, the term "qualified" means, that a person has met State educational agency approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which he or she is providing special education or related services.

(20 U.S.C. 1417(b))

§ 121a.13 Related services.

(§) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation; early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

(1) "Audiology" includes:

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of pupils, parents, and teachers regarding hearing loss; and

(vi) Determination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) "Counseling services" means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) "Early identification" means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) "Medical services" means services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services.

(5) "Occupational therapy" includes:

(i) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(ii) Improving ability to perform tasks for independent functioning when functions are impaired or lost; and

(iii) Preventing, through early intervention, initial or further impairment or loss of function.

(6) "Parent counseling and training" means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(7) "Physical therapy" means services provided by a qualified physical therapist.

(8) "Psychological services" include:

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning.

(iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents.

(9) "Recreation" includes:

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(10) "School health services" means services provided by a qualified school nurse or other qualified person.

(11) "Social work services in schools" include:

(i) Preparing a social or developmental history on a handicapped child;

(ii) Group and individual counseling with the child and family;

(iii) Working with those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school; and

(iv) Mobilizing school and community resources to enable the child to re-

ceive maximum benefit from his or her educational program.

(12) "Speech pathology" includes:

(i) Identification of children with speech or language disorders;

(ii) Diagnosis and appraisal of specific speech or language disorders;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language disorders;

(iv) Provisions of speech and language services for the habilitation or prevention of communicative disorders; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language disorders.

(13) "Transportation" includes:

(i) Travel to and from school and between schools,

(ii) Travel in and around school buildings, and

(iii) Specialized equipment (such as special or adapted, buses, lifts, and ramps), if required to provide special transportation for a handicapped child.

(20 U.S.C. 1401 (17))

Comment. With respect to related services, the Senate Report states:

The Committee bill provides a definition of "related services," making clear that all such related services may not be required for each individual child and that such term includes early identification and assessment of handicapping conditions and the provision of services to minimize the effects of such conditions.

(Senate Report No. 94-168, p. 12 (1975))

The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a handicapped child to benefit from special education.

There are certain kinds of services which might be provided by persons from varying professional backgrounds and with a variety of operational titles, depending upon requirements in individual States. For example, counseling services might be provided by social workers, psychologists, or guidance counselors, and psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists, depending upon State standards.

Each related service defined under this part may include appropriate administrative and supervisory activities that are necessary

for program planning, management, and evaluation.

§ 121a.14 Special education.

(a)(1) As used in this part, the term "special education" means specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(2) The term includes speech pathology, or any other related service, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child, and is considered "special education" rather than a "related service" under State standards.

(3) The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child.

(b) The terms in this definition are defined as follows:

(1) "At no cost" means that all specially designed instruction is provided without charge, but does not preclude incidental fees which are normally charged to non-handicapped students or their parents as a part of the regular education program.

(2) "Physical education" is defined as follows:

(i) The term means the development of:

- (A) Physical and motor fitness;
- (B) Fundamental motor skills and patterns; and
- (C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports).

(ii) The term includes special physical education, adapted physical education, movement education, and motor development.

(20 U.S.C. 1401 (16))

(3) "Vocational education" means organized educational programs which are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

(20 U.S.C. 1401 (16))

Comment. (1) The definition of "special education" is a particularly important one under these regulations, since a child is not handicapped unless he or she needs special education. (See the definition of "handicapped children" in section 121a.5.) The definition of "related services" (section 121a.13) also depends on this definition, since a related service must be necessary for a child to benefit from special education. Therefore, if a child does not need special education, there can be no "related services," and the child (because not "handicapped") is not covered under the Act.

(2) The above definition of vocational education is taken from the Vocational Education Act of 1963, as amended by Pub. L. 94-482. Under that Act, "vocational education" includes industrial arts and consumer and homemaking education programs.

§ 121a.15 State.

As used in this part, the term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(20 U.S.C. 1401(6))

Subpart B—State Annual Program Plans and Local Applications

ANNUAL PROGRAM PLANS—GENERAL

§ 121a.110 Condition of assistance.

In order to receive funds under Part B of the Act for any fiscal year, a State must submit an annual program plan to the Commissioner through its State educational agency.

(20 U.S.C. 1232c(b), 1412, 1413)

§ 121a.111 Contents of plan.

Each annual program plan must contain the provisions required in this subpart.

(20 U.S.C. 1412, 1413, 1232c(b))

§ 121a.112 Certification by the State educational agency and attorney general.

Each annual program plan must include:

(a) A certification by the officer of the State educational agency authorized to submit the plan that:

(1) The plan has been adopted by the State educational agency, and

(2) The plan is the basis for the operation and administration of the activities to be carried out in that State under Part B of the Act; and

(b) A certification by the State Attorney General or other authorized State legal officer that:

(1) The State educational agency has authority under State law to submit the plan and to administer or to supervise the administration of the plan, and

(2) All plan provisions are consistent with State law.

(20 U.S.C. 1413(a))

§ 121a.113 Approval; disapproval.

(a) The Commissioner shall approve any annual program plan which meets the requirements of this part and Subpart B of Part 100b of this chapter.

(b) The Commissioner shall disapprove any annual program plan which does not meet those requirements but may not finally disapprove a plan before giving reasonable notice and an opportunity for a hearing to the State educational agency.

(c) The Commissioner shall use the procedures set forth in §§ 121a.580-121a.583 of Subpart E for a hearing under this section.

(20 U.S.C. 1413(c))

§ 121a.114 Effective period of annual program plan.

(a) Each annual program plan is effective for a period from the date it becomes effective under § 100b.35 of this chapter through the following June 30.

(b) The Commissioner may extend the effective period of an annual program plan, on the request of a State, if the plan meets the requirements of this part and Part B of the Act.

(20 U.S.C. 1413(a), 1232c(b))

ANNUAL PROGRAM PLANS—CONTENTS

§ 121a.120 Public participation.

(a) Each annual program plan must include procedures which insure that the requirements in §§ 121a.280-121a.284 are met.

(b) Each annual program plan must also include the following:

(1) A statement describing the methods used by the State educational agency to provide notice of the public hearings on the annual program plan. The statement must include:

(i) A copy of each news release and advertisement used to provide notice,

(ii) A list of the newspapers and other media in which the State educational agency announced or published the notice, and

(iii) The dates on which the notice was announced or published.

(2) A list of the dates and locations of the public hearings on the annual program plan.

(3) A summary of comments received by the State educational agency and a description of the modifications that the State educational agency has made in the annual program plan as a result of the comments.

(4) A statement describing the methods by which the annual program plan will be made public after its approval by the Commissioner. This statement must include the information required under paragraph (b)(1) of this section.

(20 U.S.C. 1412(7))

§ 121a.121 Right to a free appropriate public education.

(a) Each annual program plan must include information which shows that the State has in effect a policy which insures that all handicapped children have the right to a free appropriate public education within the age ranges and timelines under § 121a.122.

(b) The information must include a copy of each State statute, court order, State Attorney General opinion, and other State document that shows the source of the policy.

(c) The information must show that the policy:

(1) Applies to all public agencies in the State;

(2) Applies to all handicapped children;

(3) Implements the priorities established under § 121a.127(a)(1) of this subpart; and

(4) Establishes timeliness for implementing the policy, in accordance with § 121a.122.

(20 U.S.C. 1412(1)(2)(B), (6), 1413(a)(3))

§ 121a.122 Timeliness and ages for free appropriate public education.

(a) *General.* Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to insure that a free appropriate public education is available for all handicapped children aged three through eighteen within the State not later than September 1, 1978, and for all handicapped children aged three through twenty-one within the State not later than September 1, 1980.

(b) *Documents relating to timeliness.* Each annual program plan must include a copy of each statute, court order, attorney general decision, an other State document which demonstrates that the State has established timeliness in accordance with paragraph (a) of this section.

(c) *Exception.* The requirement in paragraph (a) of this section does not apply to a State with respect to handicapped children aged three, four, five, eighteen, nineteen, twenty, or twenty-one to the extent that the requirement would be inconsistent with State law or practice, or the order of any court, respecting public education for one or more of those age groups in the State.

(d) *Documents relating to exceptions.* Each annual program plan must:

(1) Describe in detail the extent to which the exception in paragraph (c) of this section applies to the State, and

(2) Include a copy of each State law, court order, and other document which provides a basis for the exception.

(20 U.S.C. 1412(2)(B))

§ 121a.123 Full educational opportunity goal.

Each annual program plan must include in detail the policies and procedures which the State will undertake, or has undertaken, in order to insure that the State has a goal of providing full educational opportunity to all handicapped children aged birth through twenty-one.

(20 U.S.C. 1412(2)(A))

§ 121a.124 Full educational opportunity goal—data requirement.

Beginning with school year 1978-1979, each annual program plan must contain the following information:

(a) The estimated number of handicapped children who need special education and related services.

(b) For the current school year:

(i) The number of handicapped children aged birth through two, who are receiving special education and related services; and

(2) The number of handicapped children:

(i) Who are receiving a free appropriate public education,

(ii) Who need, but are not receiving a free appropriate public education,

(iii) Who are enrolled in public private institutions who are receiving a free appropriate public education, and

(iv) Who are enrolled in public and private institutions and are not receiving a free appropriate public education.

(c) The estimated numbers of handicapped children who are expected to receive special education and related services during the next school year.

(d) A description of the basis used to determine the data required under this section.

(e) The data required by paragraphs (a), (b), and (c) of this section must be provided:

(1) For each disability category (except for children aged birth through two), and

(2) For each of the following age ranges: birth through two, three through five, six through seventeen, and eighteen through twenty-one.

(20 U.S.C. 1412(2)(A))

Comment. In Part B of the Act, the term "disability" is used interchangeably with "handicapping condition". For consistency in this regulation, a child with a "disability" means a child with one of the impairments listed in the definition of "handicapped children" in § 121a.5. If the child needs special education because of the impairment. In essence, there is a continuum of impairments. When an impairment is of such a nature that the child needs special education, it is referred to as a disability. In these regulations, and the child is a "handicapped" child.

§ 121a.125

States should note that data required under this section are not to be transmitted to the Commissioner in personally identifiable form. Generally, except for such purposes as monitoring and auditing, neither the States nor the Federal Government should have to collect data under this part in personally identifiable form.

§ 121a.125 Full educational opportunity goal—timetable.

(a) *General requirement.* Each annual program plan must contain a detailed timetable for accomplishing the goal of providing full educational opportunity for all handicapped children.

(b) *Content of timetable.* (1) The timetable must indicate what percent of the total estimated number of handicapped children the State expects to have full educational opportunity in each succeeding school year.

(2) The data required under this paragraph must be provided:

(i) For each disability category (except for children aged birth through two), and

(ii) For each of the following age ranges: birth through two, three through five, six through seventeen, and eighteen through twenty-one.

(20 U.S.C. 1412(2)(A))

§ 121a.126 Full educational opportunity goal—facilities, personnel, and services.

(a) *General requirement.* Each annual program plan must include a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet the goal of providing full educational opportunity for all handicapped children. The State educational agency shall include the data required under paragraph (b) of this section and whatever additional data are necessary to meet the requirement.

(b) *Statistical description.* Each annual program plan must include the following data:

(1) The number of additional special class teachers, resource room teachers, and itinerant or consultant teachers needed for each disability category and the number of each of these who are currently employed in the State.

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(2) The number of other additional personnel needed, and the number currently employed in the State, including school psychologists, school social workers, occupational therapists, physical therapists, home-hospital teachers, speech-language pathologists, audiologists, teacher aides, vocational education teachers, work study coordinators, physical education teachers, therapeutic recreation specialists, diagnostic personnel, supervisors, and other instructional and non-instructional staff.

(3) The total number of personnel reported under paragraph (b) (1) and (2) of this section, and the salary costs of those personnel.

(4) The number and kind of facilities needed for handicapped children and the number and kind currently in use in the State, including regular classes serving handicapped children, self-contained classes on a regular school campus, resource rooms, private special education day schools, public special education day schools, private special education residential schools, public special education residential schools, hospital programs, occupational therapy facilities, physical therapy facilities, public sheltered workshops, private sheltered workshops, and other types of facilities.

(5) The total number of transportation units needed for handicapped children, the number of transportation units designed for handicapped children which are in use in the State, and the number of handicapped children who use these units to benefit from special education.

(c) *Data categories.* The data required under paragraph (b) of this section must be provided as follows:

(1) Estimates for serving all handicapped children who require special education and related services,

(2) Current year data, based on the actual numbers of handicapped children receiving special education and related services (as reported under Subpart G), and

(3) Estimates for the next school year.

(d) *Rationale.* Each annual program plan must include a description of the means used to determine the number and salary costs of personnel.

(20 U.S.C. 1412(2)(A))

§ 121a.127 Priorities.

(a) *General requirement.* Each annual program plan must include information which shows that:

(1) The State has established priorities which meet the requirements under §§ 121a.320-121a.324 of Subpart C.

(2) The State priorities meet the timeliness under § 121a.122 of this subpart, and

(3) The State has made progress in meeting those timeliness.

(b) *Child data.* (1) Each annual program plan must show the number of handicapped children known by the State to be in each of the first two priority groups named in §§ 121a.321 of Subpart C:

(i) By disability category, and

(ii) By the age ranges in § 121a.124(e)(2) of this subpart.

(c) *Activities and resources.* Each annual program plan must show for each of the first two priority groups:

(1) The programs, services, and activities that are being carried out in the State,

(2) The Federal, State, and local resources that have been committed during the current school year, and

(3) The programs, services, activities, and resources that are to be provided during the next school year.

(20 U.S.C. 1412(3))

§ 121a.128 Identification, location, and evaluation of handicapped children.

(a) *General requirement.* Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken to insure that:

(1) All children who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated; and

(2) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

(b) *Information.* Each annual program plan must:

(1) Designate the State agency (if other than the State educational agency) responsible for coordinating the planning and implementation of the policies and procedures under paragraph (a) of this section;

(2) Name each agency that participates in the planning and implementation and describe the nature and extent of its participation;

(3) Describe the extent to which:

(i) The activities described in paragraph (a) of this section have been achieved under the current annual program plan, and

(ii) The resources named for these activities in that plan have been used;

(4) Describe each type of activity to be carried out during the next school year, including the role of the agency named under paragraph (b)(1) of this section, timelines for completing those activities, resources that will be used, and expected outcomes;

(5) Describe how the policies and procedures under paragraph (a) of this section will be monitored to insure that the State educational agency obtains:

(i) The number of handicapped children within each disability category that have been identified, located, and evaluated, and

(ii) Information adequate to evaluate the effectiveness of those policies and procedures; and

(6) Describe the method the State uses to determine which children are currently receiving special education and related services and which children are not receiving special education and related services.

(20 U.S.C. 1412(2)(C))

Comment. The State is responsible for insuring that all handicapped children are identified, located, and evaluated, including children in all public and private agencies and institutions in the State. Collection and use of data are subject to the confidentiality requirements in §§ 121a.560-121a.576.

§ 121a.129 Confidentiality of personally identifiable information.

(a) Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to

insure the protection of the confidentiality of any personally identifiable information collected, used, or maintained under this part.

(b) The Commissioner shall use the criteria in §§ 121a.560-121a.576 of Subpart E to evaluate the policies and procedures of the State under paragraph (a) of this section.

(20 U.S.C. 1412(2)(D); 1417(c))

Comment. The confidentiality regulations were published in the *FEDERAL REGISTER* in final form on February 27, 1978 (41 FR 8603-8610), and met the requirements of Part B of the Act, as amended by Pub. L. 94-142. Those regulations are incorporated in § 121a.560-121a.576 of Subpart E.

§ 121a.130 Individualized education programs.

(a) Each annual program plan must include information which shows that each public agency in the State maintains records of the individualized education program for each handicapped child, and each public agency establishes, reviews, and revises each program as provided in Subpart C.

(b) Each annual program plan must include:

(1) A copy of each State statute, policy, and standard that regulates the manner in which individualized education programs are developed, implemented, reviewed, and revised, and

(2) The procedures which the State educational agency follows in monitoring and evaluating those programs.

(20 U.S.C. 1412(4))

§ 121a.131 Procedural safeguards.

Each annual program plan must include procedural safeguards which insure that the requirements in §§ 121a.500-121a.514 of Subpart E are met.

(20 U.S.C. 1412(5)(A))

§ 121a.132 Least restrictive environment.

(a) Each annual program plan must include procedures which insure that the requirements in §§ 121a.550-121a.556 of Subpart E are met.

(b) Each annual program plan must include the following information:

(1) The number of handicapped children in the State, within each disability category, who are participating in

regular education programs, consistent with §§ 121a.550-121a.556 of Subpart E.

(2) The number of handicapped children who are in separate classes or separate school facilities, or who are otherwise removed from the regular education environment.

(20 U.S.C. 1412(5)(B))

§ 121a.133 Protection in evaluation procedures.

Each annual program plan must include procedures which insure that the requirements in §§ 121a.530-121a.534 of Subpart E are met.

(10 U.S.C. 1412(5)(C))

§ 121a.134 Responsibility of State educational agency for all educational programs.

(a) Each annual program plan must include information which shows that the requirements in § 121a.600 of Subpart F are met.

(b) The information under paragraph (a) of this section must include a copy of each State statute, State regulation, signed agreement between respective agency officials, and any other document that shows compliance with that paragraph.

(20 U.S.C. 1412(6))

§ 121a.135 Monitoring procedures.

Each annual program plan must include information which shows that the requirements in § 121a.601 and § 121a.602 of Subpart F are met.

(20 U.S.C. 1412(6))

§ 121a.136 Implementation procedures—State educational agency.

Each annual program plan must describe the procedures the State educational agency follows to inform each public agency of its responsibility for insuring effective implementation of procedural safeguards for the handicapped children served by that public agency.

(20 U.S.C. 1412(6))

§ 121a.137 Procedures for consultation.

Each annual program plan must include an assurance that in carrying

out the requirements of section 612 of the Act, procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents of handicapped children.

(20 U.S.C. 1412(7)(A))

§ 121a.138 Other Federal programs.

Each annual program plan must provide that programs and procedures are established to insure that funds received by the State or any public agency in the State under any other Federal program, including section 121 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241e-2), section 305(b)(8) of that Act (20 U.S.C. 844a(b)(8)) or Title IV-C of that Act (20 U.S.C. 1831), and section 110(a) of the Vocational Education Act of 1963, under which there is specific authority for assistance for the education of handicapped children, are used by the State, or any public agency in the State, only in a manner consistent with the goal of providing free appropriate public education for all handicapped children, except that nothing in this section limits the specific requirements of the laws governing those Federal programs.

(20 U.S.C. 1413(a)(2))

§ 121a.139 Comprehensive system of personnel development.

Each annual program plan must include the material required under §§ 121a.380-121a.387 of Subpart C.

(20 U.S.C. 1413(a)(3))

§ 121a.140 Private schools.

Each annual program plan must include policies and procedures which insure that the requirements of Subpart D are met.

(20 U.S.C. 1413(a)(4))

§ 121a.141 Recovery of funds for misclassified children.

Each annual program plan must include policies and procedures which insure that the State seeks to recover any funds provided under Part B of the Act for services to a child who is determined to be erroneously classi-

fied as eligible to be counted under section 611 (a) or (d) of the Act.

(20 U.S.C. 1413(a)(5))

§ 121a.142 Control of funds and property.

Each annual program plan must provide assurance satisfactory to the Commissioner that the control of funds provided under Part B of the Act, and title to property acquired with those funds, is in a public agency for the uses and purposes provided in this part, and that a public agency administers the funds and property.

(20 U.S.C. 1413(a)(6))

§ 121a.143 Records.

Each annual program plan must provide for keeping records and affording access to those records, as the Commissioner may find necessary to assure the correctness and verification of reports and of proper disbursement of funds provided under Part B of the Act.

(20 U.S.C. 1413(a)(7)(B))

§ 121a.144 Hearing on application.

Each annual program plan must include procedures to insure that the State educational agency does not take any final action with respect to an application submitted by a local educational agency before giving the local educational agency reasonable notice and an opportunity for a hearing.

(20 U.S.C. 1413(a)(8))

§ 121a.145 Prohibition of commingling.

Each annual program plan must provide assurance satisfactory to the Commissioner that funds provided under Part B of the Act are not commingled with State funds.

(20 U.S.C. 1413(a)(9))

Comment. This assurance is satisfied by the use of a separate accounting system that includes an "audit trail" of the expenditure of the Part B funds. Separate bank accounts are not required. (See 45 CFR 100b, Subpart F (Cash Depositories))

§ 121a.146 Annual evaluation.

Each annual program plan must include procedures for evaluation at least annually of the effectiveness of

programs in meeting the educational needs of handicapped children, including evaluation of individualized education programs.

(20 U.S.C. 1413(a)(11))

§ 121a.147 State advisory panel.

Each annual program plan must provide that the requirements of §§ 121a.650-121a.653 of Subpart F are met.

(20 U.S.C. 1413(a)(12))

§ 121a.148 Policies and procedures for use of Part B funds.

Each annual program plan must set forth policies and procedures designed to insure that funds paid to the State under Part B of the Act are spent in accordance with the provisions of Part B, with particular attention given to sections 611(b), 611(c), 611(d), 612(2), and 612(3) of the Act.

(20 U.S.C. 1413(a)(1))

§ 121a.149 Description of use of Part B funds.

(a) *State allocation.* Each annual program plan must include the following information about the State's use of funds under § 121a.370 of Subpart C and § 121a.620 of Subpart F:

(1) A list of administrative positions, and a description of duties for each person whose salary is paid in whole or in part with those funds.

(2) For each position, the percentage of salary paid with those funds.

(3) A description of each administrative activity the State educational agency will carry out during the next school year with those funds.

(4) A description of each direct service and each support service which the State educational agency will provide during the next school year with those funds, and the activities the State advisory panel will undertake during that period with those funds.

(b) *Local educational agency allocation.* Each annual program plan must include:

(1) An estimate of the number and percent of local educational agencies in the State which will receive an allocation under this part (other than local educational agencies which submit a consolidated application),

(2) An estimate of the number of local educational agencies which will receive an allocation under a consolidated application,

(3) An estimate of the number of consolidated applications and the average number of local educational agencies per application, and

(4) A description of direct services the State educational agency will provide under § 121a.360 of Subpart C.

(20 U.S.C. 1232c(b)(1)(B)(ii))

§ 121a.150 Nondiscrimination and employment of handicapped individuals.

(a) Each annual program plan must include an assurance that the program assisted under Part B of the Act will be operated in compliance with Title 45 of the Code of Federal Regulations Part 84 (Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefitting from Federal Financial Assistance). The State educational agency may incorporate this assurance by reference if it has already been filed with the Department of Health, Education, and Welfare.

(b) The assurance under paragraph (a) of this section covers, among other things, the specific requirement on employment of handicapped individuals under section 606 of the Act, which states:

The Secretary shall assure that each recipient of assistance under this Act shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this Act.

(20 U.S.C. 1405; 29 U.S.C. 794)

§ 121a.151 Additional information if the State educational agency provides direct services.

If a State educational agency provides free appropriate public education for handicapped children or provides them with direct services, its annual program plan must include the information required under §§ 121a.226-121a.228, 121a.231, and 121a.235.

(20 U.S.C. 1413(b))

**LOCAL EDUCATIONAL AGENCY
APPLICATIONS—GENERAL**

§ 121a.189 Submission of application.

In order to receive payments under Part B of the Act for any fiscal year a local educational agency must submit an application to the State educational agency.

(20 U.S.C. 1414(a))

§ 121a.181 Responsibilities of State educational agency.

Each State educational agency shall establish the procedures and format which a local educational agency uses in preparing and submitting its application.

(20 U.S.C. 1414(a))

§ 121a.182 The excess cost requirement.

A local educational agency may only use funds under Part B of the Act for the excess costs of providing special education and related services for handicapped children.

(20 U.S.C. 1414 (a)(1), (a)(2)(B)(i))

§ 121a.183 Meeting the excess cost requirement.

(a) A local educational agency meets the excess cost requirement if it has on the average spent at least the amount determined under § 121a.184 for the education of each of its handicapped children. This amount may not include capital outlay or debt service.

(b) Each local educational agency must keep records adequate to show that it has met the excess cost requirement.

(20 U.S.C. 1402(20); 1414(a)(1))

Comment. The excess cost requirement means that the local educational agency must spend a certain minimum amount for the education of its handicapped children before Part B funds are used. This insures that children served with Part B funds have at least the same average amount spent on them, from sources other than Part B, as do the children in the school district taken as a whole.

The minimum amount that must be spent for the education of handicapped children is computed under a statutory formula. Section 121a.184 implements this formula and gives a step-by-step method to determine the minimum amount. Excess costs are

those costs of special education and related services which exceed the minimum amount. Therefore, if a local educational agency can show that it has (on the average) spent the minimum amount for the education of each of its handicapped children, it has met the excess cost requirement, and all additional costs are excess costs. Part B funds can then be used to pay for these additional costs, subject to the other requirements of Part B (priorities, etc.). In the "Comment" under section 121a.184, there is an example of how the minimum amount is computed.

§ 121a.184 Excess costs—computation of minimum amount.

The minimum average amount a local educational agency must spend under § 121a.183 for the education of each of its handicapped children is computed as follows:

(a) Add all expenditures of the local educational agency in the preceding school year, except capital outlay and debt service:

(1) For elementary school students, if the handicapped child is an elementary school student, or

(2) For secondary school students, if the handicapped child is a secondary school student.

(b) From this amount, subtract the total of the following amounts spent for elementary school students or for secondary school students, as the case may be:

(1) Amounts the agency spent in the preceding school year from funds awarded under Part B of the Act and Titles I and VII of the Elementary and Secondary Education Act of 1965, and

(2) Amounts from State and local funds which the agency spent in the preceding school year for:

(i) Programs for handicapped children.

(ii) Programs to meet the special educational needs of educationally deprived children, and

(iii) Programs of bilingual education for children with limited English-speaking ability.

(c) Divide the result under paragraph (b) of this section by the average number of students enrolled in the agency in the preceding school year:

(1) In its elementary schools, if the handicapped child is an elementary school student, or

(2) In its secondary schools, if the handicapped child is a secondary school student.

(20 U.S.C. 1414(a)(1))

Comment. The following is an example of how a local educational agency might compute the average minimum amount it must spend for the education of each of its handicapped children, under § 121a.183. This example follows the formula in § 121a.184. Under the statute and regulations, the local educational agency must make one computation for handicapped children in its elementary schools and a separate computation for handicapped children in its secondary schools. The computation for handicapped elementary school students would be done as follows:

a. First, the local educational agency must determine its total amount of expenditures for elementary school students from all sources—local, State, and Federal (including Part B)—in the preceding school year. Only capital outlay and debt service are excluded.

Example: A local educational agency spent the following amounts last year for elementary school students (including its handicapped elementary school students):

(1) From local tax funds	\$2,750,000
(2) From State funds	7,000,000
(3) From Federal funds	750,000
	<hr/> 10,500,000

Of this total, \$500,000 was for capital outlay and debt service relating to the education of elementary school students. This must be subtracted from total expenditures:

\$10,500,000
—500,000

Total expenditures for elementary school students (less capital outlay and debt service) = 10,000,000

b. Next, the local educational agency must subtract amounts spent for:

- (1) Programs for handicapped children;
- (2) Programs to meet the special educational needs of educationally deprived children; and
- (3) Programs of bilingual education for children with limited English-speaking ability.

These are funds which the local educational agency actually spent, not funds received last year but carried over for the current school year.

Example: The local educational agency spent the following amounts for elementary school students last year:

(1) From funds under Title I of the Elementary and Secondary Education Act of 1965	\$300,000
(2) From a special State program for educationally deprived children	200,000
(3) From a grant under Part B	200,000

(4) From State funds for the education of handicapped children	500,000
(5) From a locally-funded program for handicapped children	250,000
(6) From a grant for a bilingual education program under Title VII of the Elementary and Secondary Education Act of 1965	150,000
Total	<hr/> 1,600,000

(A local educational agency would also include any other funds it spent from Federal, State, or local sources for the three basic purposes: handicapped children, educationally deprived children, and bilingual education for children with limited English-speaking ability.)

This amount is subtracted from the local educational agency's total expenditure for elementary school students computed above:

\$10,000,000
—1,600,000

8,400,000

c. The local educational agency next must divide by the average number of students enrolled in the elementary schools of the agency last year (including its handicapped students).

Example: Last year, an average of 7,000 students were enrolled in the agency's elementary schools. This must be divided into the amount computed under the above paragraph:

\$8,400,000/7,000 students = \$1,200/student

This figure is in the minimum amount the local educational agency must spend (on the average) for the education of each of its handicapped students. Funds under Part B may be used only for costs over and above this minimum. In this example, if the local educational agency has 100 handicapped elementary school students, it must keep records adequate to show that it has spent at least \$120,000 for the education of those students (100 students times \$1,200/student), not including capital outlay and debt service.

This \$120,000 may come from any funds except funds under Part B, subject to any legal requirements that govern the use of those other funds.

If the local educational agency has handicapped secondary school students, it must do the same computation for them. However the amounts used in the computation would be those the local educational agency spent last year for the education of secondary school students, rather than for elementary school students.

§ 121a.185 Computation of excess costs—consolidated application.

The minimum average amount under § 121a.183 where two or more

local educational agencies submit a consolidated application, is the average of the combined minimum average amounts determined under § 121a.184 in those agencies for elementary or secondary school students, as the case may be.

(20 U.S.C. 1414(a)(1))

§ 121a.186 Excess costs—limitation on use of Part B funds.

(a) The excess cost requirement prevents a local educational agency from using funds provided under Part B of the Act to pay for all of the costs directly attributable to the education of a handicapped child, subject to paragraph (b) of this section.

(b) The excess cost requirement does not prevent a local educational agency from using Part B funds to pay for all of the costs directly attributable to the education of a handicapped child in any of the age ranges three, four, five, eighteen, nineteen, twenty, or twenty-one. If no local or State funds are available for non-handicapped children in that age range. However, the local educational agency must comply with the non-supplanting and other requirements of this part in providing the education and services.

(20 U.S.C. 1402(20); 1414(a)(1))

§ 121a.190 Consolidated applications.

(a) *Voluntary applications.* Local educational agencies may submit a consolidated application for payments under Part B of the Act.

(b) *Required applications.* A State educational agency may require local educational agencies to submit a consolidated application for payments under Part B of the Act if the State educational agency determines that an individual application submitted by a local educational agency will be disapproved because:

(1) The agency's entitlement is less than the \$7,500 minimum required by section 611(c)(4)(A)(i) of the Act (§ 121a.360(a)(1) of Subpart C); or

(2) The agency is unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

(c) *Size and scope of program.* The State educational agency shall establish standards and procedures for determinations under paragraph (b)(2) of this section.

(20 U.S.C. 1414(c)(1))

§ 121a.191 Payments under consolidated applications.

In any case in which a consolidated application is approved by the State educational agency, the payments to the participating local educational agencies must be equal to the sum of the entitlements of the separate local educational agencies.

(20 U.S.C. 1414(c)(2)(A))

§ 121a.192 State regulation of consolidated applications.

(a) The State educational agency shall issue regulations with respect to consolidated applications submitted under this part.

(b) The State educational agency's regulations must:

(1) Be consistent with section 612 (1)-(7) and section 613(a) of the Act, and

(2) Provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this part.

(20 U.S.C. 1414(c)(2)(B))

(c) If an intermediate educational unit is required under State law to carry out this part, the joint responsibilities given to local educational agencies under paragraph (b)(2) of this section do not apply to the administration and disbursement of any payments received by the intermediate educational unit. Those administrative responsibilities must be carried out exclusively by the intermediate educational unit.

(20 U.S.C. 1414(c)(2)(C))

§ 121a.193 State educational agency approval; disapproval.

(a) *Approval.* A State educational agency shall approve an application submitted by a local educational agency if the State educational agency determines that the application meets the requirements under §§ 121a.220-121a.240. However, the State educa-

tional agency may not approve any application until the Commissioner approves its annual program plan for the school year covered by the application.

(b) *Disapproval.* The State educational agency shall disapprove an application if the State educational agency determines that the application does not meet a requirement under §§ 121a.220-121a.240.

(20 U.S.C. 1414(b)(1))

(c) In carrying out its functions under this section, each State educational agency shall consider any decision resulting from a hearing under §§ 121a.506-121a.513 of Subpart E which is adverse to the local educational agency involved in the decision.

(20 U.S.C. 1414(b)(3))

§ 121a.194 Withholding.

(a) If a State educational agency, after giving reasonable notice and an opportunity for a hearing to a local educational agency, decides that the local educational agency in the administration of an application approved by the State educational agency has failed to comply with any requirement in the application, the State educational agency, after giving notice to the local educational agency, shall:

(1) Make no further payments to the local educational agency until the State educational agency is satisfied that there is no longer any failure to comply with the requirement; or

(2) Consider its decision in its review of any application made by the local educational agency under § 121a.180;

(3) Or both.

(b) Any local educational agency receiving a notice from a State educational agency under paragraph (a) of this section is subject to the public notice provision in § 121a.592.

(20 U.S.C. 1414(b)(2))

LOCAL EDUCATIONAL AGENCY
APPLICATIONS—CONTENTS

§ 121a.220 Child identification.

Each application must include procedures which insure that all children residing within the jurisdiction of the local educational agency who are handicapped, regardless of the sever-

ity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, including a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

(20 U.S.C. 1414(a)(1)(A))

Comment. The local educational agency is responsible for insuring that all handicapped children within its jurisdiction are identified, located, and evaluated, including children in all public and private agencies and institutions within that jurisdiction. Collection and use of data are subject to the confidentiality requirements in §§ 121a.560-121a.576 of Subpart E.

§ 121a.221 Confidentiality of personally identifiable information.

Each application must include policies and procedures which insure that the criteria in §§ 121a.560-121a.574 of Subpart E are met.

(20 U.S.C. 1414(a)(1)(B))

§ 121a.222 Full educational opportunity goal; timetable.

Each application must: (a) Include a goal of providing full educational opportunity to all handicapped children, aged birth through 21, and

(b) Include a detailed timetable for accomplishing the goal.

(20 U.S.C. 1414(a)(1)(C), (D))

§ 121a.223 Facilities, personnel, and services.

Each application must provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal in § 121a.222.

(20 U.S.C. 1414(a)(1)(E))

§ 121a.224 Personnel development.

Each application must include procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under § 121a.140.

(20 U.S.C. 1414(a)(1)(C)(i))

§ 121a.225 Priorities.

Each application must include priorities which meet the requirements of §§ 121a.320-121a.324.

(20 U.S.C. 1414(a)(1)(C)(II))

§ 121a.226 Parent involvement.

Each application must include procedures to insure that, in meeting the goal under § 121a.222, the local educational agency makes provision for participation of and consultation with parents or guardians of handicapped children.

(20 U.S.C. 1414(a)(1)(C)(III))

§ 121a.227 Participation in regular educational programs.

(a) Each application must include procedures to insure that to the maximum extent practicable, and consistent with §§ 121a.550-121a.553 of Subpart E, the local educational agency provides special services to enable handicapped children to participate in regular educational programs.

(b) Each application must describe:

(1) The types of alternative placements that are available for handicapped children, and

(2) The number of handicapped children within each disability category who are served in each type of placement.

(20 U.S.C. 1414(a)(1)(C)(IV))

§ 121a.228 Public control of funds.

Each application must provide assurance satisfactory to the State educational agency that control of funds provided under Part B of the Act and title to property acquired with those funds, is in a public agency for the uses and purposes under this part, and that a public agency administers the funds and property.

(20 U.S.C. 1414(a)(2)(A))

§ 121a.229 Excess cost.

Each application must provide assurance satisfactory to the State educational agency that the local educational agency uses funds provided under Part B of the Act only for costs which exceed the amount computed under § 121a.184 and which are directly at-

tributable to the education of handicapped children.

(20 U.S.C. 1414(a)(2)(B))

§ 121a.230 Nonsupplanting.

(a) Each application must provide assurance satisfactory to the State educational agency that the local educational agency uses funds provided under Part B of the Act to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant those State and local funds.

(b) To meet the requirement in paragraph (a) of this section:

(1) The total amount or average per capita amount of State and local school funds budgeted by the local educational agency for expenditures in the current fiscal year for the education of handicapped children must be at least equal to the total amount or average per capita amount, of State and local school funds, actually expended for the education of handicapped children in the most recent preceding fiscal year for which the information is available. Allowance may be made for:

(i) Decreases in enrollment of handicapped children; and

(ii) Unusually large amounts of funds expended for such long-term purposes as the acquisition of equipment and the construction of school facilities; and

(2) The local educational agency must not use Part B funds to displace State or local funds for any particular cost.

(20 U.S.C. 1414(a)(2)(B))

Comment. Under statutes such as Title I of the Elementary and Secondary Education Act of 1965, as amended, the requirement is to not supplant funds that "would" have been expended if the Federal funds were not available. The requirement under Part B, however, is to not supplant funds which have been "expended." This use of the past tense suggests that the funds referred to are those which the State or local agency actually spent at some time before the use of the Part B funds. Therefore, in judging compliance with this requirement, the Commissioner looks to see if Part B funds are used for any costs which were previously paid for with State or local funds.

The nonsupplanting requirement prohibits a local educational agency from supplanting State and local funds with Part B funds on either an aggregate basis or for a given expenditure. This means that if an LEA spent \$100,000 for special education in FY 1977, it must budget at least \$100,000 in FY 1978, unless one of the conditions in § 121a.230(b)(1) applies.

Whether a local educational agency supplants with respect to a particular cost would depend on the circumstances of the expenditure. For example, if a teacher's salary has been switched from local funding to Part B funding, this would appear to be supplanting. However, if that teacher was taking over a different position (such as a resource room teacher, for example), it would not be supplanting. Moreover, it might be important to consider whether the particular action of a local educational agency led to an increase in services for handicapped children over that which previously existed. The intent of the requirement is to insure that Part B funds are used to increase State and local efforts and are not used to take their place. Compliance would be judged with this aim in mind. The supplanting requirement is not intended to inhibit better services to handicapped children.

§ 121a.231 Comparable services.

(a) Each application must provide assurance satisfactory to the State educational agency that the local educational agency meets the requirements of this section.

(b) A local educational agency may not use funds under Part B of the Act to provide services to handicapped children unless the agency uses State and local funds to provide services to those children which, taken as a whole are at least comparable to services provided to other handicapped children in that local educational agency.

(c) Each local educational agency shall maintain records which show that the agency meets the requirement in paragraph (b) of this section.

(20 U.S.C. 1414(a)(2)(C))

Comment. Under the "comparability" requirement, if State and local funds are used to provide certain services, those services must be provided with State and local funds to all handicapped children in the local educational agency who need them. Part B funds may then be used to supplement existing services, or to provide additional services to meet special needs. This, of course, is subject to the other requirements of the

Act, including the priorities under §§ 121a.320-121a.324.

§ 121a.232 Information—reports.

Each application must provide that the local educational agency furnishes information (which, in the case of reports relating to performance, is in accordance with specific performance criteria developed by the local educational agency and related to program objectives) as may be necessary to enable the State educational agency to perform its duties under this part, including information relating to the educational achievement of handicapped children participating in the local educational agency's programs for handicapped children.

(20 U.S.C. 1414(a)(3)(A))

§ 121a.233 Records.

Each application must provide that the local educational agency keeps such records, and affords access to those records, as the State educational agency may find necessary to insure the correctness and verification of the information that the local educational agency furnishes under § 121a.232.

(20 U.S.C. 1414(a)(3)(B))

§ 121a.234 Public participation.

(a) Each application must:

(1) Provide for making the application and all documents related to the application available to parents and the general public; and

(2) Provide that all evaluations and reports required under § 121a.232 are public information.

(b) In implementing the requirement in paragraph (a)(1), the local educational agency shall use methods for public participation within its jurisdiction which are comparable to those required in §§ 121a.280-121a.284 of this subpart. However, the local educational agency is not required to hold public hearings.

(20 U.S.C. 1414(a)(4))

§ 121a.235 Individualized education program.

Each application must include procedures to assure that the local educational agency complies with §§ 121a.340-121a.349 of Subpart C.

(20 U.S.C. 1414(a)(5))

§ 121a.236 Local policies consistent with statute.

Each application must provide assurance satisfactory to the State educational agency that all policies and programs which the local educational agency establishes and administers are consistent with section 612 (1)-(7) and section 613(a) of the Act.

(20 U.S.C. 1414(a)(6))

§ 121a.237 Procedural safeguards.

Each application must provide assurance satisfactory to the State educational agency that the local educational agency has procedural safeguards which meet the requirements of §§ 121a.500-121a.514 of Subpart E.

(20 U.S.C. 1414(a)(7))

§ 121a.238 Use of Part B funds.

Each application must describe how the local educational agency will use the funds under Part B of the Act during the next school year.

(20 U.S.C. 1414(a))

§ 121a.239 Nondiscrimination and employment of handicapped individuals.

(a) Each application must include an assurance that the program assisted under Part B of the Act will be operated in compliance with Title 45 of the Code of Federal Regulations Part 84 (Nondiscrimination on the Basis of Handicap in Programs and Activities receiving or Benefitting from Federal Financial Assistance). The local educational agency may incorporate this assurance by reference if it has already been filed with the Department of Health, Education, and Welfare.

(b) The assurance under paragraph (a) of this section covers, among other things, the specific requirement on employment of handicapped individuals under section 606 of the Act, which states:

The Secretary shall assure that each recipient of assistance under this Act shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this Act.

(20 U.S.C. 1405. 29 U.S.C. 794)

§ 121a.240 Other requirements.

Each local application must include additional procedures and information which the State educational agency may require in order to meet the State annual program plan requirements under §§ 121a.120-121a.151.

(20 U.S.C. 1414(a)(6))

APPLICATION FROM SECRETARY OF INTERIOR

§ 121a.260 Submission of annual application: approval.

In order to receive payments under this part, the Secretary of Interior shall submit an annual application which:

(a) Meets applicable requirements of section 614(a) of the Act;

(b) Includes monitoring procedures which are consistent with § 121a.601; and

(c) Includes other material as agreed to by the Commissioner and the Secretary of Interior

(20 U.S.C. 1411(f))

§ 121a.261 Public participation.

In the development of the application for the Department of Interior, the Secretary of Interior shall provide for public participation consistent with §§ 121a.280-121a.284.

(20 U.S.C. 1411(f))

§ 121a.262 Use of Part B funds.

(a) The Department of Interior may use five percent of its payments in any fiscal year, or \$200,000, whichever is greater, for administrative costs in carrying out the provisions of this Part.

(b) The remainder of the payments to the Secretary of the Interior in any fiscal year must be used in accordance with the priorities under §§ 121a.320-121a.324 of Subpart C.

(20 U.S.C. 1411(f))

§ 121a.263 Applicable regulations.

The Secretary of the Interior shall comply with the requirements under Subparts C, E, and F.

(20 U.S.C. 1411(f)(2))

PUBLIC PARTICIPATION

§ 121a.280 Public hearings before adopting an annual program plan.

(a) Prior to its adoption of an annual program plan, the State educational agency shall:

- (1) Make the plan available to the general public,
- (2) Hold public hearings, and
- (3) Provide an opportunity for comment by the general public on the plan.

(20 U.S.C. 1412(7))

§ 121a.281 Notice.

(a) The State educational agency shall provide notice to the general public of the public hearings.

(b) The notice must be in sufficient detail to inform the public about:

- (1) The purpose and scope of the annual program plan and its relation to Part B of the Education of the Handicapped Act,
- (2) The availability of the annual program plan,
- (3) The date, time, and location of each public hearing,
- (4) The procedures for submitting written comments about the plan, and
- (5) The timetable for developing the final plan and submitting it to the Commissioner for approval.

(c) The notice must be published or announced:

- (1) In newspapers or other media, or both, with circulation adequate to notify the general public about the hearings, and
- (2) Enough in advance of the date of the hearings to afford interested parties throughout the State a reasonable opportunity to participate.

(20 U.S.C. 1412(7))

(1) In newspapers or other media, or both, with circulation adequate to notify the general public about the hearings, and (2) Enough in advance of the date of the hearings to afford interested parties throughout the State a reasonable opportunity to participate.

(20 U.S.C. 1412(7))

§ 121a.282 Opportunity to participate; comment period.

(a) The State educational agency shall conduct the public hearings at times and places that afford interested parties throughout the State a reasonable opportunity to participate.

(b) The plan must be available for comment for a period of at least 30 days following the date of the notice under § 121a.281.

(20 U.S.C. 1412(7))

§ 121a.283 Review of public comments before adopting plan.

Before adopting its annual program plan, the State educational agency shall:

- (a) Review and consider all public comments, and
- (b) Make any necessary modifications in the plan.

(20 U.S.C. 1412(7))

§ 121a.284 Publication and availability of approved plan.

After the Commissioner approves an annual program plan, the State educational agency shall give notice in newspapers or other media, or both, that the plan is approved. The notice must name places throughout the State where the plan is available for access by any interested person.

(20 U.S.C. 1412(7))

Subpart C—Services

FREE APPROPRIATE PUBLIC EDUCATION

§ 121a.300 Timeliness for free appropriate public education.

(a) *General.* Each State shall insure that free appropriate public education is available to all handicapped children aged three through eighteen within the State not later than September 1, 1978, and to all handicapped children aged three through twenty-one within the State not later than September 1, 1980.

(b) *Age ranges 3-5 and 18-21.* This paragraph provides rules for applying the requirement in paragraph (a) of this section to handicapped children aged three, four, five, eighteen, nineteen, twenty, and twenty-one:

(1) If State law or a court order requires the State to provide education for handicapped children in any disability category in any of these age groups, the State must make a free appropriate public education available to all handicapped children of the same age who have that disability.

(2) If a public agency provides education to non-handicapped children in any of these age groups, it must make a free appropriate public education

available to at least a proportionate number of handicapped children of the same age.

(3) If a public agency provides education to 50 percent or more of its handicapped children in any disability category in any of these age groups, it must make a free appropriate public education available to all of its handicapped children of the same age who have that disability.

(4) If a public agency provides education to a handicapped child in any of these age groups, it must make a free appropriate public education available to that child and provide that child and his or her parents all of the rights under Part B of the Act and this part.

(5) A State is not required to make a free appropriate public education available to a handicapped child in one of these age groups if:

(i) State law expressly prohibits, or does not authorize, the expenditure of public funds to provide education to nonhandicapped children in that age group; or

(ii) The requirement is inconsistent with a court order which governs the provision of free public education to handicapped children in that State.

(20 U.S.C. 1412(2)(B); Sen. Rept. No. 94 168 p. 19 (1975))

Comment. 1. The requirement to make free appropriate public education available applies to all handicapped children within the State who are in the age ranges required under section 121a.300 and who need special education and related services. This includes handicapped children already in school and children with less severe handicaps, who are not covered under the priorities under § 121a.321.

2. In order to be in compliance with § 121a.300, each State must insure that the requirement to identify, locate, and evaluate all handicapped children is fully implemented by public agencies throughout the State. This means that before September 1, 1978, every child who has been referred or is on a waiting list for evaluation (including children in school as well as those not receiving an education) must be evaluated in accordance with §§ 121a.530-121a.533 of Subpart E. If, as a result of the evaluation, it is determined that a child needs special education and related services, an individualized education program must be developed for the child by September 1, 1978, and all other applicable requirements of this part must be met.

3. The requirement to identify, locate, and evaluate handicapped children (commonly referred to as the "child find system") was enacted on August 21, 1974, under Pub. L. 93-380. While each State needed time to establish and implement its child find system, the four year period between August 21, 1974, and September 1, 1978, is considered to be sufficient to insure that the system is fully operational and effective on a State-wide basis.

Under the statute, the age range for the child find requirement (0-21) is greater than the mandated age range for providing free appropriate public education (FAPE). One reason for the broader age requirement under "child find" is to enable States to be aware of and plan for younger children who will require special education and related services. It also ties in with the full educational opportunity goal requirement, which has the same age range as child find. Moreover, while a State is not required to provide "FAPE" to handicapped children below the age ranges mandated under § 121a.300, the State may, at its discretion, extend services to those children, subject to the requirements on priorities under §§ 121a.320-121a.324.

§ 121a.301 Free appropriate public education—methods and payments.

(a) Each State may use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of this part. For example, when it is necessary to place a handicapped child in a residential facility, a State could use joint agreements between the agencies involved for sharing the cost of that placement.

(b) Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a handicapped child.

(20 U.S.C. 1401 (18); 1412(2)(B))

§ 121a.302 Residential placement.

If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(20 U.S.C. 1412(2)(B); 1413(a)(4)(B))

Comment. This requirement applies to placements which are made by public agencies for educational purposes, and includes

placements in State-operated schools for the handicapped, such as a State school for the deaf or blind.

§ 121a.303 Proper functioning of hearing aids.

Each public agency shall insure that the hearing aids worn by deaf and hard of hearing children in school are functioning properly.

(20 U.S.C. 1412(2)(B))

Comment. The report of the House of Representatives on the 1978 appropriation bill includes the following statement regarding hearing aids:

In its report on the 1976 appropriation bill the Committee expressed concern about the condition of hearing aids worn by children in public schools. A study done at the Committee's direction by the Bureau of Education for the Handicapped reveals that up to one-third of the hearing aids are malfunctioning. Obviously, the Committee expects the Office of Education will ensure that hearing impaired school children are receiving adequate professional assessment, follow-up and services.

(House Report No. 95-381, p. 67 (1977))

§ 121a.304 Full educational opportunity goal.

(a) Each State educational agency shall insure that each public agency establishes and implements a goal of providing full educational opportunity to all handicapped children in the area served by the public agency.

(b) Subject to the priority requirements under §§ 121a.320-121a.324, a State or local educational agency may use Part B funds to provide facilities, personnel, and services necessary to meet the full educational opportunity goal.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C))

Comment. In meeting the full educational opportunity goal, the Congress also encouraged local educational agencies to include artistic and cultural activities in programs supported under this part, subject to the priority requirements under §§ 121a.320-121a.324. This point is addressed in the following statements from the Senate Report on Pub. L. 94-142:

The use of the arts as a teaching tool for the handicapped has long been recognized as a viable, effective way not only of teaching special skills, but also of reaching youngsters who had otherwise been unteachable. The Committee envisions that programs under this bill could well include an

arts component and, indeed, urges that local educational agencies include the arts in programs for the handicapped funded under this Act. Such a program could cover both appreciation of the arts by the handicapped youngsters, and the utilization of the arts as a teaching tool per se.

Museum settings have often been another effective tool in the teaching of handicapped children. For example, the Brooklyn Museum has been a leader in developing exhibits utilizing the heightened tactile sensory skill of the blind, therefore, in light of the national policy concerning the use of museums in Federally supported education programs enunciated in the Education Amendments of 1974, the Committee also urges local educational agencies to include museums in programs for the handicapped funded under this Act.

(Senate Report No. 94-168, p. 13 (1975))

§ 121a.305 Program options.

Each public agency shall take steps to insure that its handicapped children have available to them the variety of educational programs and services available to non-handicapped children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C))

Comment. The above list of program options is not exhaustive, and could include any program or activity in which nonhandicapped students participate. Moreover, vocational education programs must be specially designed if necessary to enable a handicapped student to benefit fully from those programs; and the set-aside funds under the Vocational Education Act of 1963, as amended by Pub. L. 94-482, may be used for this purpose. Part B funds may also be used, subject to the priority requirements under §§ 121a.320-121a.324.

§ 121a.306 Nonacademic services.

(a) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency.

referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the public agency and assistance in making outside employment available.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C))

§ 121a.307 Physical education.

(a) *General.* Physical education services, specially designed if necessary, must be made available to every handicapped child receiving a free appropriate public education.

(b) *Regular physical education.* Each handicapped child must be afforded the opportunity to participate in the regular physical education program available to non-handicapped children unless:

(1) The child is enrolled full time in a separate facility; or

(2) The child needs specially designed physical education, as prescribed in the child's individualized education program.

(c) *Special physical education.* If specially designed physical education is prescribed in a child's individualized education program, the public agency responsible for the education of that child shall provide the services directly, or make arrangements for it to be provided through other public or private programs.

(d) *Education in separate facilities.* The public agency responsible for the education of a handicapped child who is enrolled in a separate facility shall insure that the child receives appropriate physical education services in compliance with paragraphs (a) and (c) of this section.

(20 U.S.C. 1401(16); 1412(5)(B); 1414(a)(6))

Comment. The Report of the House of Representatives on Pub. L. 94-142 includes the following statement regarding physical education

Special education as set forth in the Committee bill includes instruction in physical education, which is provided as a matter of course to all non-handicapped children enrolled in public elementary and secondary schools. The Committee is concerned that although these services are available to and required of all children in our school sys-

tems, they are often viewed as a luxury for handicapped children.

The Committee expects the Commissioner of Education to take whatever action is necessary to assure that physical education services are available to all handicapped children, and has specifically included physical education within the definition of special education to make clear that the Committee expects such services, specially designed where necessary, to be provided as an integral part of the educational program of every handicapped child.

(House Report No. 94-332, p. 9 (1975))

PRIORITIES IN THE USE OF PART B FUNDS

§ 121a.320 Definitions of "first priority children" and "second priority children."

For the purposes of §§ 121a.321-121a.324, the term:

(a) "First priority children" means handicapped children who:

(1) Are in an age group for which the State must make available free appropriate public education under § 121a.300; and

(2) Are not receiving any education.

(b) "Second priority children" means handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education.

(20 U.S.C. 1412(3))

Comment. After September 1, 1978, there should be no second priority children, since States must insure, as a condition of receiving Part B funds or fiscal year 1979, that all handicapped children will have available a free appropriate public education by that date.

NOTE.—The term "free appropriate public education," as defined in § 121a.4 of Subpart A, means "special education and related services which . . . are provided in conformity with an individualized education program . . ."

New "First priority children" will continue to be found by the State after September 1, 1978 through on-going efforts to identify, locate, and evaluate all handicapped children.

§ 121a.321 Priorities.

(a) Each State and local educational agency shall use funds provided under

Part B or the Act in the following order of priorities:

(1) To provide free appropriate public education to first priority children, including the identification, location, and evaluation of first priority children.

(2) To provide free appropriate public education to second priority children, including the identification, location, and evaluation of second priority children.

(3) To meet the other requirements in this part.

(b) The requirements of paragraph (a) of this section do not apply to funds which the State uses for administration under § 121a.620.

(20 U.S.C. 1411 (b)(1)(B), (b)(2)(B), (c)(1)(J), (c)(2)(A)(II))

(c) State and local educational agencies may not use funds under Part B of the Act for preservice training.

(20 U.S.C. 1413(a)(3); Senate Report No. 94-168, p. 34 (1975))

Comment. Note that a State educational agency as well as local educational agencies must use Part B funds (except the portion used for State administration) for the priorities. A State may have to set aside a portion of its Part B allotment to be able to serve newly identified first priority children.

After September 1, 1978, Part B funds may be used:

(1) To continue supporting child identification, location, and evaluation activities;

(2) To provide free appropriate public education to newly identified first priority children;

(3) To meet the full educational opportunities goal required under section 121a.304, including employing additional personnel and providing inservice training, in order to increase the level, intensity and quality of services provided to individual handicapped children; and

(4) To meet the other requirements of Part B.

§ 121a.322 First priority children—school year 1977-1978.

(a) In school year 1977-1978, if a major component of a first priority child's proposed educational program is not available (for example, there is no qualified teacher), the public agency responsible for the child's education shall:

(1) Provide an interim program of services for the child; and

(2) Develop an individualized education program for full implementation no later than September 1, 1978.

(b) A local educational agency may use Part B funds for training or other support services in school year 1977-1978 only if all of its first priority children have available to them at least an interim program of services.

(c) A State educational agency may use Part B funds for training or other support services in school year 1977-1978 only if all first priority children in the State have available to them at least an interim program of services.

(20 U.S.C. 1411 (b), (c))

Comment. This provision is intended to make it clear that a State or local educational agency may not delay placing a previously unserved (first priority) child until it has, for example, implemented an inservice training program. The child must be placed. After the child is in at least an interim program, the State or local educational agency may use Part B funds for training or other support services needed to provide that child with a free appropriate public education.

§ 121a.323 Services to other children.

If a State or a local educational agency is providing free appropriate public education to all of its first priority children, that State or agency may use funds provided under Part B of the Act:

(a) To provide free appropriate public education to handicapped children who are not receiving any education and who are in the age groups not covered under § 121a.300 in that State; or

(b) To provide free appropriate public education to second priority children; or

(c) Both.

(20 U.S.C. 1411 (b)(1)(B), (b)(2)(B), (c)(2)(A)(II))

§ 121a.324 Application of local educational agency to use funds for the second priority.

A local educational agency may use funds provided under Part B of the Act for second priority children, if it provides assurance satisfactory to the State educational agency in its application (or an amendment to its application):

(a) That all first priority children have a free appropriate public education available to them;

(b) That the local educational agency has a system for the identification, location, and evaluation of handicapped children, as described in its application; and

(c) That whenever a first priority child is identified, located, and evaluated, the local educational agency makes available a free appropriate public education to the child.

(20 U.S.C. 1411 (b)(1)(B). (c)(1)(B); 1414(a)(1)(C)(ii))

INDIVIDUALIZED EDUCATION PROGRAMS

§ 121a.340 Definition.

As used in this part, the term "individualized education program" means a written statement for a handicapped child that is developed and implemented in accordance with §§ 121a.341-121a.349.

(20 U.S.C. 1401(19))

§ 121a.341 State educational agency responsibility.

(a) *Public agencies.* The State educational agency shall insure that each public agency develops and implements an individualized education program for each of its handicapped children.

(b) *Private schools and facilities.* The State educational agency shall insure that an individualized education program is developed and implemented for each handicapped child who:

(1) Is placed in or referred to a private school or facility by a public agency; or

(2) Is enrolled in a parochial or other private school and receives special education or related services from a public agency.

(20 U.S.C. 1412 (4). (6); 1413(a)(4))

Comment. This section applies to all public agencies, including other State agencies (e.g., departments of mental health and welfare), which provide special education to a handicapped child either directly, by contract or through other arrangements. Thus, if a State welfare agency contracts with a private school or facility to provide special education to a handicapped child, that agency would be responsible for insuring

that an individualized education program is developed for the child.

§ 121a.342 When individualized education programs must be in effect.

(a) On October 1, 1977, and at the beginning of each school year thereafter, each public agency shall have in effect an individualized education program for every handicapped child who is receiving special education from that agency.

(b) An individualized education program must:

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings under § 121a.343.

(20 U.S.C. 1412 (2)(B), (4), (6); 1414(a)(5); Pub. L. 94-142, Sec. 8(c) (1975))

Comment. Under paragraph (b)(2), it is expected that a handicapped child's individualized education program (IEP) will be implemented immediately following the meetings under § 121a.343. An exception to this would be (1) when the meetings occur during the summer or a vacation period, or (2) where there are circumstances which require a short delay (e.g., working out transportation arrangements). However, there can be no undue delay in providing special education and related services to the child.

§ 121a.343 Meetings.

(a) *General.* Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program.

(b) *Handicapped children currently served.* If the public agency has determined that a handicapped child will receive special education during school year 1977-1978, a meeting must be held early enough to insure that an individualized education program is developed by October 1, 1977.

(c) *Other handicapped children.* For a handicapped child who is not included under paragraph (b) of this action, a meeting must be held within thirty calendar days of a determination that the child needs special education and related services.

(d) *Review.* Each public agency shall initiate and conduct meetings to periodically review each child's individual-

ized education program and if appropriate revise its provisions. A meeting must be held for this purpose at least once a year.

(20 U.S.C. 1412(2)(B), (4), (6); 1414(a)(5))

Comment. The dates on which agencies must have individualized education programs (IEPs) in effect are specified in § 121a.342 (October 1, 1977, and the beginning of each school year thereafter). However, except for new handicapped children (i.e., those evaluated and determined to need special education after October 1, 1977), the timing of meetings to develop, review, and revise IEPs is left to the discretion of each agency.

In order to have IEPs in effect by the dates in § 121a.342, agencies could hold meetings at the end of the school year or during the summer preceding those dates. In meeting the October 1, 1977 timeline, meetings could be conducted up through the October 1 date. Thereafter, meetings may be held any time throughout the year, as long as IEPs are in effect at the beginning of each school year.

The statute requires agencies to hold a meeting at least once each year in order to review, and if appropriate revise, each child's IEP. The timing of those meetings could be on the anniversary date of the last IEP meeting on the child, but this is left to the discretion of the agency.

§ 121a.344 Participants in meetings.

(a) *General.* The public agency shall insure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to § 121a.345.

(4) The child, where appropriate.

(5) Other individuals at the discretion of the parent or agency.

(b) *Evaluation personnel.* For a handicapped child who has been evaluated for the first time, the public agency shall insure:

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with

the child and is familiar with the results of the evaluation.

(20 U.S.C. 1401(19); 1412 (2)(B), (4), (6); 1414(a)(5))

Comment. 1. In deciding which teacher will participate in meetings on a child's individualized education program, the agency may wish to consider the following possibilities:

(a) For a handicapped child who is receiving special education, the "teacher" could be the child's special education teacher. If the child's handicap is a speech impairment, the "teacher" could be the speech-language pathologist.

(b) For a handicapped child (who is being considered for placement in special education, the "teacher" could be the child's regular teacher, or a teacher qualified to provide education in the type of program in which the child may be placed, or both.

(c) If the child is not in school or has more than one teacher, the agency may designate which teacher will participate in the meeting.

2. Either the teacher or the agency representative should be qualified in the area of the child's suspected disability.

3. For a child whose primary handicap is a speech impairment, the evaluation personnel participating under paragraph (b)(1) of this section would normally be the speech-language pathologist.

§ 121a.345 Parent participation.

(a) Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:

(1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting, and who will be in attendance.

(c) If neither parent can attend, the public agency shall use other methods to insure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to ar-

range a mutually agreed on time and place such as:

(1) Detailed records of telephone calls made or attempted and the results of those calls.

(2) Copies of correspondence sent to the parents and any responses received, and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to insure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(f) The public agency shall give the parent, on request, a copy of the individualized education program.

(20 U.S.C. 1401(19); 1412 (2)(B), (4), (6); 1414(a)(5))

Comment. The notice in paragraph (a) could also inform parents that they may bring other people to the meeting. As indicated in paragraph (c), the procedure used to notify parents (whether oral or written or both) is left to the discretion of the agency, but the agency must keep a record of its efforts to contact parents.

§ 121a.346 Content of individualized education program.

The individualized education program for each child must include:

(a) A statement of the child's present levels of educational performance;

(b) A statement of annual goals, including short term instructional objectives;

(c) A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;

(d) The projected dates for initiation of services and the anticipated duration of the services; and

(e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

(20 U.S.C. 1401(19); 1412 (2)(B), (4), (6); 1414(a)(5). Senate Report No 94-168, p. 11 (1975))

§ 121a.347 Private school placements.

(a) *Developing individualized education programs.* (1) Before a public agency places a handicapped child in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an individualized education program for the child in accordance with § 121a.343.

(2) The agency shall insure that a representative of the private school facility attends the meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school or facility, including individual or conference telephone calls.

(3) The public agency shall also develop an individualized educational program for each handicapped child who was placed in a private school or facility by the agency before the effective date of these regulations.

(b) *Reviewing and revising individualized education programs.* (1) After a handicapped child enters a private school or facility, any meetings to review and revise the child's individualized education program may be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency shall insure that the parents and an agency representative:

(i) Are involved in any decision about the child's individualized education program; and

(ii) Agree to any proposed changes in the program before those changes are implemented.

(c) *Responsibility.* Even if a private school or facility implements a child's individualized education program, responsibility for compliance with this part remains with the public agency and the State educational agency.

(20 U.S.C. 1413(a)(4)(B))

§ 121a.348 Handicapped children in parochial or other private schools.

If a handicapped child is enrolled in a parochial or other private school and receives special education or related services from a public agency, the public agency shall:

(a) Initiate and conduct meetings to develop, review, and revise an individualized education program for the child, in accordance with § 121a.343; and

(b) Insure that a representative of the parochial or other private school attends each meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school, including individual or conference telephone calls.

(20 U.S.C. 1413(a)(4)(A))

§ 121a.349 Individualized education program—accountability.

Each public agency must provide special education and related services to a handicapped child in accordance with an individualized education program. However, Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.

(20 U.S.C. 1412(2)(B); 1414(a) (5), (6); Cong. Rec. at H7152 (daily ed., July 21, 1975))

Comment. This section is intended to relieve concerns that the individualized education program constitutes a guarantee by the public agency and the teacher that a child will progress at a specified rate. However, this section does not relieve agencies and teachers from making good faith efforts to assist the child in achieving the objectives and goals listed in the individualized education program. Further, the section does not limit a parent's right to complain and ask for revisions of the child's program, or to invoke due process procedures, if the parent feels that these efforts are not being made.

**DIRECT SERVICE BY THE STATE
EDUCATIONAL AGENCY**

§ 121a.360 Use of local educational agency allocation for direct services.

(a) A State educational agency may not distribute funds to a local educational agency, and shall use those funds to insure the provision of a free appropriate public education to handicapped children residing in the area served by the local educational agency, if the local educational agency, in any fiscal year:

(1) Is entitled to less than \$7,500 for that fiscal year (beginning with fiscal year 1979);

(2) Does not submit an application that meets the requirements of §§ 121a.220-121a.240;

(3) Is unable or unwilling to establish and maintain programs of free appropriate public education;

(4) Is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain those programs; or

(5) Has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of those children.

(b) In meeting the requirements of paragraph (a) of this section, the State educational agency may provide special education and related services directly, by contract, or through other arrangements.

(c) The excess cost requirements under §§ 121a.182-121a.186 do not apply to the State educational agency.

(20 U.S.C. 1411(c)(4); 1413(b); 1414(d))

Comment. Section 121a.360 is a combination of three provisions in the statute (Sections 611(c)(4), 613(b), and 614(d)). This section focuses mainly on the State's administration and use of local entitlements under Part B.

The State educational agency, as a recipient of Part B funds is responsible for insuring that all public agencies in the State comply with the provisions of the Act, regardless of whether they receive Part B funds. If a local educational agency elects not to apply for its Part B entitlement, the State would be required to use those funds to insure that a free appropriate public education (FAPE) is made available to children residing in the area served by that local agency. However, if the local entitlement is not sufficient for this purpose, additional State or local funds would have to be expended in order to insure that "FAPE" and the other requirements of the Act are met.

Moreover, if the local educational agency is the recipient of any other Federal funds, it would have to be in compliance with Subpart D of the regulations for section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84). It should be noted that the term "FAPE" has different meanings under Part D and section 504. For example, under Part B, "FAPE" is a statutory term which requires special education and related services to be provided in accordance with an individualized education program (IEP). However, under section 504, each recipient must

provide an education which includes services that are "designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met Those regulations state that implementation of an IEP, in accordance with Part B, is one means of meeting the "FAPE" requirement.

§ 121a.361 Nature and location of services.

The State educational agency may provide special education and related services under § 121a.360(a) in the manner and at the location it considers appropriate. However, the manner in which the education and services are provided must be consistent with the requirements of this part (including the least restrictive environment provisions in §§ 121a.550-121a.556 of Subpart E).

(20 U.S.C. 1414(d))

§ 121a.370 Use of State educational agency allocation for direct and support services.

(a) The State shall use the portion of its allocation it does not use for administration to provide support services and direct services in accordance with the priority requirements under §§ 121a.320-121a.324.

(b) For the purposes of paragraph (a) of this section:

(1) "Direct services" means services provided to a handicapped child by the State directly, by contract, or through other arrangements.

(2) "Support services" includes implementing the comprehensive system of personnel development under §§ 121a.380-121a.388, recruitment and training of hearing officers and surrogate parents, and public information and parent training activities relating to a free appropriate public education for handicapped children.

(20 U.S.C. 1411(b)(2), (c)(2))

§ 121a.371 State matching.

Beginning with the period July 1, 1978-June 30, 1979, and for each following year, the funds that a State uses for direct and support services under § 121a.370 must be matched on a program basis by the State from funds other than Federal funds. This requirement does not apply to funds that the State uses under § 121a.360.

(20 U.S.C. 1411(c)(2)(B), (c)(4)(B))

Comment. The requirement in § 121a.371 would be satisfied if the State can document that the amount of State funds expended for each major program area (e.g., the comprehensive system of personnel development) is at least equal to the expenditure of Federal funds in that program area.

§ 121a.372 Applicability of nonsupplanting requirement.

Beginning with funds appropriated for Fiscal Year 1979 and for each following Fiscal Year, the requirement in section 613(a)(9) of the Act, which prohibits supplanting with Federal funds, does not apply to funds that the State uses from its allocation under § 121a.706(a) of Subpart G for administration, direct services, or support services.

(20 U.S.C. 1411(c)(3))

COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT

§ 121a.380 Scope of system.

Each annual program plan must include a description of programs and procedures for the development and implementation of a comprehensive system of personnel development which includes:

(a) The inservice training of general and special educational instructional, related services, and support personnel;

(b) Procedures to insure that all personnel necessary to carry out the purposes of the Act are qualified (as defined in § 121a.12 of Subpart A) and that activities sufficient to carry out this personnel development plan are scheduled; and

(c) Effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped-children significant information derived from educational research, demonstration, and similar projects, and for adopting, where appropriate, promising educational practices and materials developed through those projects.

(20 U.S.C. 1413(a)(3))

§ 121a.381 Participation of other agencies and institutions.

(a) The State educational agency must insure that all public and private institutions of higher education, and other agencies and organizations (including representatives of handicapped, parent, and other advocacy organizations) in the state which have an interest in the preparation of personnel for the education of handicapped children, have an opportunity to participate fully in the development, review, and annual updating of the comprehensive system of personnel development.

(b) The annual program plan must describe the nature and extent of participation under paragraph (a) of this section and must describe responsibilities of the State educational agency, local educational agencies, public and private institutions of higher education, and other agencies:

(1) With respect to the comprehensive system as a whole, and

(2) With respect to the personnel development plan under § 121a.383.

(20 U.S.C. 1412(7)(A); 1413(a)(3))

§ 121a.382 Inservice training.

(a) As used in this section, "inservice training" means any training other than that received by an individual in a full-time program which leads to a degree.

(b) Each annual program plan must provide that the State educational agency:

(1) Conducts an annual needs assessment to determine if a sufficient number of qualified personnel are available in the State; and

(2) Initiates inservice personnel development programs based on the assessed needs of State-wide significance related to the implementation of the Act.

(c) Each annual program plan must include the results of the needs assessment under paragraph (b)(1) of this section, broken out by need for new personnel and need for retrained personnel.

(d) The State educational agency may enter into contracts with institutions of higher education, local educational agencies or other agencies, institutions, or organizations (which may

include parent, handicapped, or other advocacy organizations), to carry out:

(1) Experimental or innovative personnel development programs;

(2) Development or modification of instructional materials; and

(3) Dissemination of significant information derived from educational research and demonstration projects.

(e) Each annual program plan must provide that the State educational agency insures that ongoing inservice training programs are available to all personnel who are engaged in the education of handicapped children, and that these programs include:

(1) The use of incentives which insure participation by teachers (such as released time, payment for participation, options for academic credit, salary step/credit, certification renewal, or updating professional skills);

(2) The involvement of local staff; and

(3) The use of innovative practices which have been found to be effective.

(f) Each annual program plan must:

(1) Describe the process used in determining the inservice training needs of personnel engaged in the education of handicapped children;

(2) Identify the areas in which training is needed (such as individualized education programs, non-discriminatory testing, least restrictive environment, procedural safeguards, and surrogate parents);

(3) Specify the groups requiring training (such as special teachers, regular teachers, administrators, psychologists, speech-language pathologists, audiologists, physical education teachers, therapeutic recreation specialists, physical therapists, occupational therapists, medical personnel, parents, volunteers, hearing officers, and surrogate parents);

(4) Describe the content and nature of training for each area under paragraph (f)(2) of this section;

(5) Describe how the training will be provided in terms of (i) geographical scope (such as Statewide, regional, or local), and (ii) staff training source (such as college and university staffs, State and local educational agency personnel, and non-agency personnel);

(6) Specify: (i) The funding sources to be used, and

(ii) The time frame for providing it; and

(7) Specify procedures for effective evaluation of the extent to which program objectives are met.

(20 U.S.C. 1413(a)(3))

§ 121a.383 Personnel development plan.

Each annual program plan must: (a) Include a personnel development plan which provides a structure for personnel planning and focuses on preservice and inservice education needs;

(b) Describe the results of the needs assessment under § 121a.382(b)(1) with respect to identifying needed areas of training, and assigning priorities to those areas; and

(c) Identify the target populations for personnel development, including general education and special education instructional and administrative personnel, support personnel, and other personnel (such as paraprofessionals, parents, surrogate parents, and volunteers).

(20 U.S.C. 1413(a)(3))

§ 121a.384 Dissemination.

(a) Each annual program plan must include a description of the State's procedures for acquiring, reviewing, and disseminating to general and special educational instructional and support personnel, administrators of programs for handicapped children, and other interested agencies and organizations (including parent, handicapped, and other advocacy organizations) significant information and promising practices derived from educational research, demonstration, and other projects.

(b) Dissemination includes:

(1) Making those personnel, administrators, agencies, and organizations aware of the information and practices;

(2) Training designed to enable the establishment of innovative programs and practices targeted on identified local needs; and

(3) Use of instructional materials and other media for personnel development and instructional programming.

(20 U.S.C. 1413(a)(3))

§ 121a.385 Adoption of educational practices.

(a) Each annual program plan must provide for a statewide system designed to adopt, where appropriate, promising educational practices and materials proven effective through research, and demonstration.

(b) Each annual program plan must provide for thorough reassessment of educational practices used in the State.

(c) Each annual program plan must provide for the identification of State, local, and regional resources (human and material) which will assist in meeting the State's personnel preparation needs.

(20 U.S.C. 1413(a)(3))

§ 121a.386 Evaluation.

Each annual program plan must include:

(a) Procedures for evaluating the overall effectiveness of:

(1) The comprehensive system of personnel development in meeting the needs for personnel, and

(2) The procedures for administration of the system; and

(b) A description of the monitoring activities that will be undertaken to assure the implementation of the comprehensive system of personnel development.

(20 U.S.C. 1413(a)(3))

§ 121a.387 Technical assistance to local educational agencies.

Each annual program plan must include a description of technical assistance that the State educational agency gives to local educational agencies in their implementation of the State's comprehensive system of personnel development.

(20 U.S.C. 1413(a)(3))

Subpart D—Private Schools

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS PLACED OR REFERRED BY PUBLIC AGENCIES

§ 121a.400 Applicability of §§ 121a.401-121a.403.

Sections 121a.401-121a.403 apply only to handicapped children who are or have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services.

(20 U.S.C. 1413(a)(4)(B))

§ 121a.401 Responsibility of State educational agency.

Each State educational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services;

(1) In conformance with an individualized education program which meets the requirements under §§ 121a.340-121a.349 of Subpart C;

(2) At no cost to the parents; and

(3) At a school or facility which meets the standards that apply to State and local educational agencies (including the requirements in this part); and

(b) Has all of the rights of a handicapped child who is served by a public agency.

(20 U.S.C. 1413(a)(4)(B))

§ 121a.402 Implementation by State educational agency.

In implementing § 121a.401, the State educational agency shall:

(a) Monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires,

(b) Disseminate copies of applicable standards to each private school and facility to which a public agency has referred or placed a handicapped child; and

(c) Provide an opportunity for those private schools and facilities to participate in the development and revision of State standards which apply to them

(20 U.S.C. 1413(a)(4)(B))

§ 121a.403 Placement of children by parents.

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§ 121a.450-121a.460.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under §§ 121a.500-121a.514 of Subpart E.

(20 U.S.C. 1412(2)(B), 1415)

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS NOT PLACED OR REFERRED BY PUBLIC AGENCIES

§ 121a.450 Applicability of §§ 121a.451-121a.460.

As used in §§ 121a.451-121a.460, "private school handicapped children" means handicapped children enrolled in private schools or facilities other than handicapped children covered under §§ 121a.400-121a.403.

(20 U.S.C. 1413(a)(4)(A))

§ 121a.451 State educational agency responsibility.

The State educational agency shall insure that:

(a) To the extent consistent with their number and location in the State, provision is made for the participation of private school handicapped children in the program assisted or carried out under this part by providing them with special education and related services; and

(b) The other requirements in §§ 121a.452-121a.460 are met.

(20 U.S.C. 1413(a)(4)(A))

§ 121a.452 Local educational agency responsibility.

(a) Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped

children residing in the jurisdiction of the agency.

(b) Each local educational agency shall provide private school handicapped children with genuine opportunities to participate in special education and related services consistent with the number of those children and their needs.

(20 U.S.C. 1413(a)(4)(A); 1414(a)(6))

§ 121a.453 Determination of needs, number of children, and types of services.

The needs of private school handicapped children, the number of them who will participate under this part, and the types of special education and related services which the local educational agency will provide for them must be determined after consultation with persons knowledgeable of the needs of these children, on a basis comparable to that used in providing for the participation under this part of handicapped children enrolled in public schools.

(20 U.S.C. 1413(a)(4)(A))

§ 121a.454 Service arrangements.

Services to private school handicapped children may be provided through such arrangements as dual enrollment, educational radio and television, and the provision of mobile educational services and equipment.

(20 U.S.C. 1413(a)(4)(A))

§ 121a.455 Differences in services to private school handicapped children.

A local educational agency may provide special education and related services to private school handicapped children which are different from the special education and related services it provides to public school children, if:

(a) The differences are necessary to meet the special needs of the private school handicapped children, and

(b) The special education and related services are comparable in quality, scope, and opportunity for participation to those provided to public school children with needs of equal importance.

(20 U.S.C. 1413(a)(4)(A); *Wheeler v Barrera*, 417 U.S. 402(1974))

§ 121a.456 Personnel.

(a) Public school personnel may be made available in other than public school facilities only to the extent necessary to provide services required by the handicapped children for whose needs those services were designed, and only when those services are not normally provided by the private school.

(b) Each State or local educational agency providing services to children enrolled in private schools shall maintain continuing administrative control and direction over those services.

(c) The services provided with funds under Part B of the Act for eligible handicapped children enrolled in private schools may not include:

(1) The payment of salaries of teachers or other employees of private schools except for services performed outside their regular hours of duty and under public supervision and control; or

(2) The construction of private school facilities.

(20 U.S.C. 1413(a)(4)(A))

§ 121a.457 Equipment.

(a) Equipment acquired with funds under Part B of the Act may be placed on private school premises for a limited period of time, but the title to and administrative control over all equipment must be retained and exercised by a public agency.

(b) In exercising administrative control, the public agency shall keep records of and account for the equipment, and shall insure that the equipment is used solely for the purposes of the program or project, and remove the equipment from the private school premises if necessary to avoid its being used for other purposes or if it is no longer needed for the purposes of the program or project.

(20 U.S.C. 1413(a)(4)(A))

§ 121a.458 Prohibition of segregation.

Programs or projects carried out in public facilities, and involving joint participation by eligible handicapped children enrolled in private schools and handicapped children enrolled in public schools, may not include classes that are separated on the basis of

school enrollment or the religious affiliations of the children.

(20 U.S.C. 1413(a)(4)(A))

§ 121a.459 Funds and property not to benefit private school.

Funds provided under Part B of the Act and property derived from those funds may not inure to the benefit of any private school.

(20 U.S.C. 1413(a)(4)(A))

§ 121a.460 Existing level of instruction.

Provisions for serving private school handicapped children may not include the financing of the existing level of instruction in the private schools.

(20 U.S.C. 1413(a)(4)(A))

Subpart E—Procedural Safeguards

DUE PROCESS PROCEDURES FOR PARENTS AND CHILDREN

§ 121a.500 Definitions of "consent", "evaluation", and "personally identifiable".

As used in this part: "Consent" means that: (a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;

(b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) which will be released and to whom; and

(c) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

"Evaluation" means procedures used in accordance with §§ 121a.530-121a.534 to determine whether a child is handicapped and the nature and extent of the special education and related services that the child needs. The term means procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class.

"Personally identifiable" means that information includes:

(a) The name of the child, the child's parent, or other family member;

(b) The address of the child;

(c) A personal identifier, such as the child's social security number or student number, or

(d) A list of personal characteristics or other information which would make it possible to identify the child with reasonable certainty.

(20 U.S.C. 1415, 1417(c))

§ 121a.501 General responsibility of public agencies.

Each State educational agency shall insure that each public agency establishes and implements procedural safeguards which meet the requirements of §§ 121a.500-121a.514.

(20 U.S.C. 1415(a))

§ 121a.502 Opportunity to examine records.

The parents of a handicapped child shall be afforded, in accordance with the procedures in §§ 121a.562-121a.569 an opportunity to inspect and review all education records with respect to:

(a) The identification, evaluation, and educational placement of the child, and

(b) The provision of a free appropriate public education to the child.

(20 U.S.C. 1415(b)(1)(A))

§ 121a.503 Independent educational evaluation.

(a) *General.* (1) The parents of a handicapped child have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency shall provide to parents, on request, information about where an independent educational evaluation may be obtained.

(3) For the purposes of this part:

(i) "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.

(ii) "Public expense" means that the public agency either pays for the full cost of the evaluation or insures that

the evaluation is otherwise provided at no cost to the parent, consistent with § 121a.301 of Subpart C.

(b) *Parent right to evaluation at public expense.* A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. However, the public agency may initiate a hearing under § 121a.506 of this subpart to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(c) *Parent initiated evaluations.* If the parent obtains an independent educational evaluation at private expense, the results of the evaluation:

(1) Must be considered by the public agency in any decision made with respect to the provision of a free appropriate public education to the child, and

(2) May be presented as evidence at a hearing under this subpart regarding that child.

(d) *Requests for evaluations by hearing officers.* If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(e) *Agency criteria.* Whenever an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the public agency uses when it initiates an evaluation.

(20 U.S.C. 1415(b)(1)(A))

§ 121a.504 Prior notice: parent consent.

(a) *Notice.* Written notice which meets the requirements under § 121a.505 must be given to the parents of a handicapped child a reasonable time before the public agency:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or

(2) Refuses to initiate or change the identification, evaluation, or educa-

tional placement of the child or the provision of a free appropriate public education to the child.

(b) *Consent.* (1) Parental consent must be obtained before:

(i) Conducting a preplacement evaluation; and

(ii) Initial placement of a handicapped child in a program providing special education and related services.

(2) Except for preplacement evaluation and initial placement, consent may not be required as a condition of any benefit to the parent or child.

(c) *Procedures where parent refuses consent.* (1) Where State law requires parental consent before a handicapped child is evaluated or initially provided special education and related services, State procedures govern the public agency in overriding a parent's refusal to consent.

(2)(i) Where there is no State law requiring consent before a handicapped child is evaluated or initially provided special education and related services, the public agency may use the hearing procedures in §§ 121a.506-121a.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent.

(ii) If the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under §§ 121a.510-121a.513.

(20 U.S.C. 1415(b)(1)(C), (D))

Comment. 1. Any changes in a child's special education program, after the initial placement, are not subject to parental consent under Part B, but are subject to the prior notice requirement in paragraph (a) and the individualized education program requirements in Subpart C.

2. Paragraph (c) means that where State law requires parental consent before evaluation or before special education and related services are initially provided, and the parent refuses (or otherwise withholds) consent, State procedures, such as obtaining a court order authorizing the public agency to conduct the evaluation or provide the education and related services, must be followed.

If, however, there is no legal requirement for consent outside of these regulations, the public agency may use the due process procedure under this subpart to obtain a deci-

sion to allow the evaluation or services without parental consent. The agency must notify the parent of its actions, and the parent has appeal rights as well as rights at the hearing itself.

§ 121a.505 Content of notice.

(a) The notice under § 121a.504 must include:

(1) A full explanation of all of the procedural safeguards available to the parents under Subpart E;

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and

(4) A description of any other factors which are relevant to the agency's proposal or refusal.

(b) The notice must be:

(1) Written in language understandable to the general public, and

(2) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(c) If the native language or other mode of communication of the parent is not a written language, the State or local educational agency shall take steps to insure:

(1) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(2) That the parent understands the content of the notice, and

(3) That there is written evidence that the requirements in paragraph (c) (1) and (2) of this section have been met.

(20 U.S.C. 1415(b)(1)(D))

§ 121a.506 Impartial due process hearing.

(a) A parent or a public educational agency may initiate a hearing on any of the matters described in § 121a.504(a) (1) and (2).

(b) The hearing must be conducted by the State educational agency or the public agency directly responsible for the education of the child, as deter-

mined under State statute, State regulation, or a written policy of the State educational agency.

(c) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if:

(1) The parent requests the information; or

(2) The parent or the agency initiates a hearing under this section.

(20 U.S.C. 1416(b)(2))

Comment: Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by the statute or these regulations, an agency may wish to suggest mediation in disputes concerning the identification, evaluation, and educational placement of handicapped children, and the provision of a free appropriate public education to those children. Mediations have been conducted by members of State educational agencies or local educational agency personnel who were not previously involved in the particular case. In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress. However, mediation may not be used to deny or delay a parent's rights under this subpart.

§ 121a.507 Impartial hearing officer.

(a) A hearing may not be conducted:

(1) By a person who is an employee of a public agency which is involved in the education or care of the child, or

(2) By any person having a personal or professional interest which would conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(c) Each public agency shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(20 U.S.C. 1414(b)(2))

§ 121a.508 Hearing rights.

(a) Any party to a hearing has the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing;

(4) Obtain a written or electronic verbatim record of the hearing;

(5) Obtain written findings of fact and decisions. (The public agency shall transmit those findings and decisions, after deleting any personally identifiable information; to the State advisory panel established under Subpart F).

(b) Parents involved in hearings must be given the right to:

(1) Have the child who is the subject of the hearing present; and

(2) Open the hearing to the public.

(20 U.S.C. 1415(d))

§ 121a.509 Hearing decision: appeal.

A decision made in a hearing conducted under this subpart is final, unless a party to the hearing appeals the decision under § 121a.510 or § 121a.511.

(20 U.S.C. 1415(c))

§ 121a.510 Administrative appeal; impartial review.

(a) If the hearing is conducted by a public agency other than the State educational agency, any party aggrieved by the findings and decision in the hearing may appeal to the State educational agency.

(b) If there is an appeal, the State educational agency shall conduct an impartial review of the hearing. The official conducting the review shall:

(1) Examine the entire hearing record;

(2) Insure that the procedures at the hearing were consistent with the requirements of due process;

(3) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in § 121a.508 apply;

(4) Afford the parties an opportunity for oral or written argument, or

both, at the discretion of the reviewing official;

(5) Make an independent decision on completion of the review; and

(6) Give a copy of written findings and the decision to the parties.

(c) The decision made by the reviewing official is final, unless a party brings a civil action under § 121a.512.

(20 U.S.C. 1415 (c), (d); H. Rep. No. 94-664, at p. 49 (1975))

Comment. 1. The State educational agency may conduct its review either directly or through another State agency acting on its behalf. However, the State educational agency remains responsible for the final decision on review.

2. All parties have the right to continue to be represented by counsel at the State administrative review level, whether or not the reviewing official determines that a further hearing is necessary. If the reviewing official decides to hold a hearing to receive additional evidence, the other rights in section 121a.508, relating to hearings, also apply.

§ 121a.511 Civil action.

Any party aggrieved by the findings and decision made in a hearing who does not have the right to appeal under § 121a.510 of this subpart, and any party aggrieved by the decision of a reviewing officer under § 121a.510 has the right to bring a civil action under section 615(e)(2) of the Act.

(20 U.S.C. 1415)

§ 121a.512 Timeliness and convenience of hearings and reviews.

(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place which is reasonably convenient to the parents and child involved.

(20 U.S.C. 1415)

§ 121a.513 Child's status during proceedings.

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

(20 U.S.C. 1415(e)(3))

Comment. Section 121a.513 does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

§ 121a.514 Surrogate parents.

(a) *General.* Each public agency shall insure that the rights of a child are protected when:

- (1) No parent (as defined in § 121a.10) can be identified;
- (2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or
- (3) The child is a ward of the State under the laws of that State.

(b) *Duty of public agency.* The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method (1) for determining whether a child needs a surrogate parent, and (2) for assigning a surrogate parent to the child.

(c) *Criteria for selection of surrogates.* (1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies shall insure that a person selected as a surrogate:

(i) Has no interest that conflicts with the interest of the child he or she represents; and

(ii) Has knowledge and skills, that insure adequate representation of the child.

(d) *Non-employee requirement; compensation.* (1) A person assigned as a surrogate may not be an employee of a public agency which is involved in the education or care of the child.

(2) A person who otherwise qualifies to be a surrogate parent under paragraph (c) and (d)(1) of this section, is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(e) *Responsibilities.* The surrogate parent may represent the child in all matters relating to:

(1) The identification, evaluation, and educational placement of the child, and

(2) The provision of a free appropriate public education to the child.

(20 U.S.C. 1415(b)(1)(B))

PROTECTION IN EVALUATION
PROCEDURES

§ 121a.530 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 121a.530-121a.534.

(b) Testing and evaluation materials and procedures used for the purposes of evaluation and placement of handicapped children must be selected and administered so as not to be racially or culturally discriminatory.

(20 U.S.C. 1412(5)(C))

§ 121a.531 Preplacement evaluation.

Before any action is taken with respect to the initial placement of a handicapped child in a special education program, a full and individual evaluation of the child's educational needs must be conducted in accordance with the requirements of § 121a.532.

(20 U.S.C. 1412(5)(C))

§ 121a.532 Evaluation procedures.

State and local educational agencies shall insure, at a minimum, that:

(a) Tests and other evaluation materials:

(1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

(2) Have been validated for the specific purpose for which they are used; and

(3) Are administered by trained personnel in conformance with the instructions provided by their producer;

(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;

(c) Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors which the test purports to measure);

(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child; and

(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability.

(f) The child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(20 U.S.C. 1412(5)(C))

Comment. Children who have a speech impairment as their primary handicap may not need a complete battery of assessments (e.g., psychological, physical, or adaptive behavior). However, a qualified speech-language pathologist would (1) evaluate each speech impaired child using procedures that are appropriate for the diagnosis and appraisal of speech and language disorders, and (2) where necessary, make referrals for

additional assessments needed to make an appropriate placement decision.

§ 121a.533 Placement procedures.

(a) In interpreting evaluation data and in making placement decisions, each public agency shall:

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(2) Insure that information obtained from all of these sources is documented and carefully considered;

(3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(4) Insure that the placement decision is made in conformity with the least restrictive environment rules in §§ 121a.550-121a.554.

(b) If a determination is made that a child is handicapped and needs special education and related services, an individualized education program must be developed for the child in accordance with §§ 121a.340-121a.349 of Subpart C.

(20 U.S.C. 1412(5)(C); 1414(a)(5))

Comment. Paragraph (2)(1) includes a list of examples of sources that may be used by a public agency in making placement decisions. The agency would not have to use all the sources in every instance. The point of the requirement is to insure that more than one source is used in interpreting evaluation data and in making placement decisions. For example, while all of the named sources would have to be used for a child whose suspected disability is mental retardation, they would not be necessary for certain other handicapped children, such as a child who has a severe articulation disorder as his primary handicap. For such a child, the speech-language pathologist, in complying with the multisource requirement, might use (1) a standardized test of articulation, and (2) observation of the child's articulation behavior in conversational speech.

§ 121a.534 Reevaluation.

Each State and local educational agency shall insure:

(a) That each handicapped child's individualized education program is re-

viewed in accordance with §§ 121a.340-121a.349 of Subpart C, and

(b) That an evaluation of the child, based on procedures which meet the requirements under § 121a.532, is conducted every three years or more frequently if conditions warrant or if the child's parent or teacher requests an evaluation.

(20 U.S.C. 1412(5)(c))

ADDITIONAL PROCEDURES FOR EVALUATING SPECIFIC LEARNING DISABILITIES

§ 121a.540 Additional team members.

In evaluating a child suspected of having a specific learning disability, in addition to the requirements of § 121a.532, each public agency shall include on the multidisciplinary evaluation team:

(a)(1) The child's regular teacher; or
(2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or

(3) For a child of less than school age, an individual qualified by the State educational agency to teach a child of his or her age; and

(b) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.

(20 U.S.C. 1411 note)

[42 FR 65083, Dec. 29, 1977]

§ 121a.541 Criteria for determining the existence of a specific learning disability.

(a) A team may determine that a child has a specific learning disability if:

(1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, when provided with learning experiences appropriate for the child's age and ability levels; and

(2) The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas:

- (i) Oral expression;
- (ii) Listening comprehension;
- (iii) Written expression;
- (iv) Basic reading skill;

- (v) Reading comprehension;
- (vi) Mathematics calculation; or
- (vii) Mathematics reasoning.

(b) The team may not identify a child as having a specific learning disability if the severe discrepancy between ability and achievement is primarily the result of:

- (1) A visual, hearing, or motor handicap;
- (2) Mental retardation;
- (3) Emotional disturbance; or
- (4) Environmental, cultural or economic disadvantage.

(20 U.S.C. 1411 note)

[42 FR 65083, Dec. 29, 1977]

§ 121a.542 Observation.

(a) At least one team member other than the child's regular teacher shall observe the child's academic performance in the regular classroom setting.

(b) In the case of a child of less than school age or out of school, a team member shall observe the child in an environment appropriate for a child of that age.

(20 U.S.C. 1411 note)

[42 FR 65083, Dec. 29, 1977]

§ 121a.543 Written report.

(a) The team shall prepare a written report of the results of the evaluation.

(b) The report must include a statement of:

- (1) Whether the child has a specific learning disability;
- (2) The basis for making the determination;
- (3) The relevant behavior noted during the observation of the child;
- (4) The relationship of that behavior to the child's academic functioning;
- (5) The educationally relevant medical findings, if any;
- (6) Whether there is a severe discrepancy between achievement and ability which is not correctable without special education and related services; and
- (7) The determination of the team concerning the effects of environmental, cultural, or economic disadvantage.

(c) Each team member shall certify in writing whether the report reflects his or her conclusion. If it does not reflect his or her conclusion, the team

member must submit a separate statement presenting his or her conclusions.

(20 U.S.C. 1411 note)

[42 FR 65083, Dec. 29, 1977]

LEAST RESTRICTIVE ENVIRONMENT

§ 121a.550 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 121a.550-121a.556.

(b) Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(20 U.S.C. 1412(5)(B); 1414(a)(1)(C)(iv))

§ 121a.551 Continuum of alternative placements.

(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under § 121a.13 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

(20 U.S.C. 1412(5)(B))

§ 121a.552 Placement.

Each public agency shall insure that:

(a) Each handicapped child's educational placement: (1) Is determined at least annually.

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home;

(b) The various alternative placements included under § 121a.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

(20 U.S.C. 1412(5)(B))

Comment. Section 121a.552 includes some of the main factors which must be considered in determining the extent to which a handicapped child can be educated with children who are not handicapped. The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to insure that each handicapped child receives an education which is appropriate to his or her individual needs.

The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84—Appendix, Paragraph 24) includes several points regarding educational placements of handicapped children which are pertinent to this section:

1. With respect to determining proper placements, the analysis states: "... it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs * * *."

2. With respect to placing a handicapped child in an alternate setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take this factor into account in making placement decisions. The parent's right to challenge the placement of their child extends not only to placement in special classes or separate schools, but also

to placement in a distant school, particularly in a residential program. An equally appropriate education program may exist closer to home; and this issue may be raised by the parent under the due process provisions of this subpart.

§ 121a.553 Nonacademic settings.

In providing or arranging for the provision of nonacademic and extra-curricular services and activities, including meals, recess periods, and the services and activities set forth in § 121a.306 of Subpart C, each public agency shall insure that each handicapped child participates with non-handicapped children in those services and activities to the maximum extent appropriate to the needs of that child.

(20 U.S.C. 1412(5)(B))

Comment. Section 121a.553 is taken from a new requirement in the final regulations for Section 504 of the Rehabilitation Act of 1973. With respect to this requirement, the analysis of the Section 504 Regulations includes the following statement: "[A new paragraph] specifies that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children." (45 CFR Part 84—Appendix, Paragraph 24.)

§ 121a.554 Children in public or private institutions.

Each State educational agency shall make arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures) as may be necessary to insure that § 121a.550 is effectively implemented.

(20 U.S.C. 1412(5)(B))

Comment. Under section 612(5)(B) of the statute, the requirement to educate handicapped children with nonhandicapped children also applies to children in public and private institutions or other care facilities. Each State educational agency must insure that each applicable agency and institution in the State implements this requirement. Regardless of other reasons for institutional placement, no child in an institution who is capable of education in a regular public

school setting may be denied access to an education in that setting.

§ 121a.555 Technical assistance and training activities.

Each State educational agency shall carry out activities to insure that teachers and administrators in all public agencies:

(a) Are fully informed about their responsibilities for implementing § 121a.550, and

(b) Are provided with technical assistance and training necessary to assist them in this effort.

(20 U.S.C. 1412(5)(B))

§ 121a.556 Monitoring activities.

(a) The State educational agency shall carry out activities to insure that § 121a.550 is implemented by each public agency.

(b) If there is evidence that a public agency makes placements that are inconsistent with § 121a.550 of this subpart, the State educational agency:

(1) Shall review the public agency's justification for its actions, and

(2) Shall assist in planning and implementing any necessary corrective action.

(20 U.S.C. 1412(5)(B))

CONFIDENTIALITY OF INFORMATION

§ 121a.560 Definitions.

As used in this subpart:

"Destruction" means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

"Education records" means the type of records covered under the definition of "education records" in Part 99 of this title (the regulations implementing the Family Educational Rights and Privacy Act of 1974).

"Participating agency" means any agency or institution which collects, maintains, or uses personally identifiable information, or from which information is obtained, under this part.

(20 U.S.C. 1412(2)(D), 1417(c))

§ 121a.561 Notice to parents.

(a) The State educational agency shall give notice which is adequate to fully inform parents about the requirements under § 121a.128 of Subpart B, including:

(1) A description of the extent to which the notice is given in the native languages of the various population groups in the State;

(2) A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;

(3) A summary of the policies and procedures which participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and

(4) A description of all of the rights of parents and children regarding this information, including the rights under section 438 of the General Education Provisions Act and Part 99 of this title (the Family Educational Rights and Privacy Act of 1974, and implementing regulations).

(b) Before any major identification, location, or evaluation activity, the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of the activity.

(20 U.S.C. 1412(2)(D); 1417(c))

§ 121a.562 Access rights.

(a) Each participating agency shall permit parents to inspect and review any education records relating to their children which are collected, maintained, or used by the agency under this part. The agency shall comply with a request without unnecessary delay and before any meeting regarding an individualized education program or hearing relating to the identification, evaluation, or placement of the child, and in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under this section includes:

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

(20 U.S.C. 1412(2)(D); 1417(c))

§ 121a.563 Record of access.

Each participating agency shall keep a record of parties obtaining access to education records collected, maintained, or used under this part (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.

(20 U.S.C. 1412(2)(D); 1417(c))

§ 121a.564 Records on more than one child.

If any education record includes information on more than one child, the parents of those children shall have the right to inspect and review only the information relating to their child or to be informed of that specific information.

(20 U.S.C. 1412(2)(D); 1417(c))

§ 121a.565 List of types and locations of information.

Each participating agency shall provide parents on request a list of the types and locations of education records.

§ 121a.566

ords collected, maintained, or used by the agency.

(20 U.S.C. 1412(2)(D); 1417(c))

§ 121a.566 Fees.

(a) A participating education agency may charge a fee for copies of records which are made for parents under this part if the fee does not effectively prevent the parents from exercising their right to inspect and review those records.

(b) A participating agency may not charge a fee to search for or to retrieve information under this part.

(20 U.S.C. 1412(2)(D); 1417(c))

§ 121a.567 Amendment of records at parent's request.

(a) A parent who believes that information in education records collected, maintained, or used under this part is inaccurate or misleading or violates the privacy or other rights of the child, may request the participating agency which maintains the information to amend the information.

(b) The agency shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the agency decides to refuse to amend the information in accordance with the request it shall inform the parent of the refusal, and advise the parent of the right to a hearing under § 121a.568.

(20 U.S.C. 1412(2)(D); 1417(c))

§ 121a.568 Opportunity for a hearing.

The agency shall, on request, provide an opportunity for a hearing to challenge information in education records to insure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child.

(20 U.S.C. 1412(2)(D); 1417(c))

§ 121a.569 Result of hearing.

(a) If, as a result of the hearing, the agency decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights

of the child, it shall amend the information accordingly and so inform the parent in writing.

(b) If, as a result of the hearing, the agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy of other rights of the child, it shall inform the parent of the right to place in the records it maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

(c) Any explanation placed in the records of the child under this section must:

(1) Be maintained by the agency as part of the records of the child as long as the record or contested portion is maintained by the agency; and

(2) If the records of the child or the contested portion is disclosed by the agency to any party, the explanation must also be disclosed to the party.

(20 U.S.C. 1412(2)(D); 1417(c))

§ 121a.570 Hearing procedures.

A hearing held under § 121a.568 of this subpart must be conducted according to the procedures under § 99.22 of this title.

(20 U.S.C. 1412(2)(D); 1417(c))

§ 121a.571 Consent.

(a) Parental consent must be obtained before personally identifiable information is:

(1) Disclosed to anyone other than officials of participating agencies collecting or using the information under this part, subject to paragraph (b) of this section; or

(2) Used for any purpose other than meeting a requirement under this part.

(b) An educational agency or institution subject to Part 99 of this title may not release information from education records to participating agencies without parental consent unless authorized to do so under Part 99 of this title.

(c) The State educational agency shall include policies and procedures in its annual program plan which are

used in the event that a parent refuses to provide consent under this section.

(20 U.S.C. 1412(2)(D); 1417(c))

§ 121a.572 Safeguards.

(a) Each participating agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

(b) One official at each participating agency shall assume responsibility for insuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under § 121a.129 of Subpart B and Part 99 of this title.

(d) Each participating agency shall maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

(20 U.S.C. 1412(2)(D); 1417(c))

§ 121a.573 Destruction of information.

(a) The public agency shall inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.

(b) The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

(20 U.S.C. 1412(2)(D); 1417(c))

Comment. Under section 121a.573, the personally identifiable information on a handicapped child may be retained permanently unless the parents request that it be destroyed. Destruction of records is the best protection against improper and unauthorized disclosure. However, the records may be needed for other purposes. In informing parents about their rights under this section, the agency should remind them that the records may be needed by the child or the parents for social security benefits or other purposes. If the parents request that the information be destroyed, the agency

may retain the information in paragraph (b).

§ 121a.574 Children's rights.

The State educational agency shall include policies and procedures in its annual program plan regarding the extent to which children are afforded rights of privacy similar to those afforded to parents, taking into consideration the age of the child and type or severity of disability.

(20 U.S.C. 1412(2)(D); 1417(c))

Comment. Note that under the regulations for the Family Educational Rights and Privacy Act (45 CFR 99.4(a)), the rights of parents regarding education records are transferred to the student at age 18.

§ 121a.575 Enforcement.

The State educational agency shall describe in its annual program plan the policies and procedures, including sanctions, which the State uses to insure that its policies and procedures are followed and that the requirements of the Act and the regulations in this part are met.

(20 U.S.C. 1412(2)(D); 1417(c))

§ 121a.576 Office of Education.

If the Office of Education or its authorized representatives collect any personally identifiable information regarding handicapped children which is not subject to 5 U.S.C. 552a (The Privacy Act of 1974), the Commissioner shall apply the requirements of 5 U.S.C. section 552a (b) (1)-(2), (4)-(11); (c); (d); (e)(1); (2); (3)(A), (B), and (D), (5)-(10); (h); (m); and (n), and the regulations implementing those provisions in Part 5b of this title.

(20 U.S.C. 1412(2)(D); 1417(c))

OFFICE OF EDUCATION PROCEDURES

§ 121a.580 Opportunity for a hearing.

The Commissioner gives a State educational agency reasonable notice and an opportunity for a hearing before taking any of the following actions:

(a) Disapproval of a State's annual program plan under § 121a.113 of Subpart B.

(b) Withholding payments from a State under § 121a.590 or under sec-

tion 434(c) of the General Education Provisions Act.

(c) Waiving the requirement under § 121a.589 of this subpart regarding supplementing and supplanting with funds provided under Part B of the Act.

(20 U.S.C. 1232(c); 1413(a)(9)(B); 1413(c); 1416)

§ 121a.581 Hearing panel.

The Commissioner appoints a Hearing Panel consisting of not less than three persons to conduct any hearing under § 121a.530 of this subpart.

(20 U.S.C. 1232(c); 1413(a)(9)(B); 1413(c); 1416)

§ 121a.582 Hearing procedures.

(a)(1) If the Hearing Panel determines that oral testimony would not materially assist the resolution of disputed facts, the Panel shall give each party an opportunity for presenting the case:

- (i) In whole or in part in writing, or
- (ii) In an informal conference before the Hearing Panel.

(2) The Hearing Panel shall give each party:

- (i) Notice of the issues to be considered (if this notice has not already been given); and
- (ii) An opportunity to be represented by counsel.

(b) If the Hearing Panel determines that oral testimony would materially assist the resolution of disputed facts, the Panel shall give each party, in addition to the requirements under paragraph (a)(2) of this section:

- (1) An opportunity to obtain a record of the proceedings;
- (2) An opportunity to present witnesses on the party's behalf; and
- (3) An opportunity to cross-examine witnesses either orally or with written questions.

(20 U.S.C. 1232(c); 1413(a)(9)(B); 1413(c); 1416)

§ 121a.583 Initial decision; final decision.

(a) The Hearing Panel shall prepare an initial written decision which includes findings of fact and the conclusions based on those facts.

(b) The Hearing Panel shall mail a copy of the initial decision to each

party (or to the party's counsel) and to the Commissioner, with a notice that each party has an opportunity to submit written comments regarding the decision to the Commissioner within a specified reasonable time.

(c) The initial decision of the Hearing Panel is the final decision of the Commissioner unless, within 25 days after the end of the time for receipt of written comments, the Commissioner informs the Panel in writing that the decision is being reviewed.

(d) Review by the Commissioner is based on the decision, the written record, if any, of the Hearing Panel's proceedings, and written comments or oral arguments by the parties.

(e) No decision under this section becomes final until it is served on the State educational agency or its attorney.

(20 U.S.C. 1232(c); 1413(a)(9)(B); 1413(c); 1416)

§ 121a.589 Waiver of requirement regarding supplementing and supplanting with Part B funds.

(a) Under sections 613(a)(9)(B) and 614(a)(2)(B)(ii) of the Act, State and local educational agencies must insure that Federal funds provided under Part B of the Act are used to supplement the level of State and local funds expended for the education of handicapped children, and in no case to supplant those State and local funds. Beginning with funds appropriated for fiscal year 1979 and for each following fiscal year, the nonsupplanting requirement only applies to funds allocated to local educational agencies. (See § 121a.372.)

(b) If the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Commissioner may waive in part the requirement under sections 613(a)(9)(B) and 614(a)(2)(B)(ii) of the Act if the Commissioner concurs with the evidence provided by the State.

(c) If a State wishes to request a waiver, it must inform the Commissioner in writing. The Commissioner then provides the State with a finance and membership report form which provides the basis for the request.

(d) In its request for a waiver, the State shall include the results of a special study made by the State to obtain evidence of the availability of a free appropriate public education to all handicapped children. The special study must include statements by a representative sample of organizations which deal with handicapped children, and parents and teachers of handicapped children, relating to the following areas:

(1) The adequacy and comprehensiveness of the State's system for locating, identifying, and evaluating handicapped children, and

(2) The cost to parents, if any, for education for children enrolled in public and private day schools, and in public and private residential schools and institutions, and

(3) The adequacy of the State's due process procedures.

(e) In its request for a waiver, the State shall include finance data relating to the availability of a free appropriate public education for all handicapped children, including:

(1) The total current expenditures for regular education programs and special education programs by function and by source of funds (State, local, and Federal) for the previous school year, and

(2) The full-time equivalent membership of students enrolled in regular programs and in special programs in the previous school year.

(f) The Commissioner considers the information which the State provides under paragraph (d) and (e) of this section, along with any additional information he may request, or obtain through on-site reviews of the State's education programs and records, to determine if all children have available to them a free appropriate public education, and if so, the extent of the waiver.

(g) The State may request a hearing under §§ 121a.580-121a.583 with regard to any final action by the Commissioner under this section.

(20 U.S.C. 1411(c)(3); 1413(a)(9)(B))

§ 121a.590 Withholding payments.

(a) The Commissioner may make the following findings only after reasonable notice and an opportunity for a

hearing under §§ 121a.580-121a.583 to the State educational agency involved (and to any local educational agency affected by any failure described in paragraph (a)(2) of this section):

(1) That there has been a failure to comply substantially with the provisions of sections 612 and 613 of the Act, or

(2) That in the administration of the annual program plan there is a failure to comply with any provision of this part or with any requirement in the application of a local educational agency approved by the State educational agency under the annual program plan.

(b) After making either of the findings in paragraph (a) of this section, the Commissioner:

(1) Shall, after notifying the State educational agency, withhold any further payments to the State under this part, and

(2) May, after notifying the State educational agency, withhold further payments to the State under the Federal programs referred to in § 121a.139 of Subpart B which are within his jurisdiction, to the extent that funds under those programs are available for the provision of assistance for the education of handicapped children.

(c) If the Commissioner withholds payments under paragraph (b) of this section he may determine:

(1) That withholding is limited to programs or projects under the annual program plan, or portions of it, affected by the failure, or

(2) That the State educational agency must not make further payments under Part B of the Act to specified local educational agencies affected by the failure.

(20 U.S.C. 1416(a))

§ 121a.591 Reinstating payments.

Until the Commissioner is satisfied that there is no longer any failure to comply with the provisions of this part, as specified in § 121a.590(a):

(a) No further payments shall be made to the State under this part or under the Federal programs specified in section 613(a)(2) of the Act which are within his jurisdiction to the extent that funds under those programs are available for the provision

of assistance for the education of handicapped children, or

(b) Payments by the State educational agency under this part shall be limited to local educational agencies whose actions did not cause or were not involved in the failure.

(20 U.S.C. 1416(a))

§ 121a.592 Public notice by State and local educational agencies.

Any State educational agency and local educational agency which receives a notice under § 121a.590(a) shall by means of a public notice, take any necessary measures to inform the public within the agency's jurisdiction of the pendency of the action.

(20 U.S.C. 1416(a))

§ 121a.593 Judicial review of Commissioner's final action on annual program plan.

If any State is dissatisfied with the Commissioner's final action with respect to its annual program plan submitted under Subpart B, the State may under section 618(b) of the Act, within sixty days after notice of the action, file a petition for review of that action with the United States Court of Appeals for the circuit in which the State is located.

(20 U.S.C. 1416(b))

Subpart F—State Administration

STATE EDUCATIONAL AGENCY RESPONSIBILITIES: GENERAL

§ 121a.600 Responsibility for all educational programs.

(a) The State educational agency is responsible for insuring:

(1) That the requirements of this part are carried out; and

(2) That each educational program for handicapped children administered within the State, including each program administered by any other public agency:

(i) Is under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency, and

(ii) Meets education standards of the State educational agency (including the requirements of this part).

(b) The State must comply with paragraph (a) of this section through State statute, State regulation, signed agreement between respective agency officials, or other documents.

(20 U.S.C. 1412(6))

Comment. The requirement in § 121a.600(a) is taken essentially verbatim from section 612(6) of the statute and reflects the desire of the Congress for a central point of responsibility and accountability in the education of handicapped children within each State. With respect to State educational agency responsibility, the Senate Report on Pub. L. 94-142 includes the following statements:

This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children, and to assure that in the implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency . . .

Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency. (Senate Report No. 94-168, p. 24 (1975))

In meeting the requirements of this section, there are a number of acceptable options which may be adopted, including the following:

(1) Written agreements are developed between respective State agencies concerning State educational agency standards and monitoring. These agreements are binding on the local or regional counterparts of each State agency.

(2) The Governor's Office issues an administrative directive establishing the State educational agency responsibility.

(3) State law, regulation, or policy designates the State educational agency as responsible for establishing standards for all educational programs for the handicapped, and includes responsibility for monitoring.

(4) State law mandates that the State educational agency is responsible for all educational programs.

§ 121a.601 Monitoring and evaluation activities.

Each State educational agency shall:

(a) Undertake monitoring and evaluation activities to insure compliance of all public agencies within the State with the requirements of Subparts C, D, and E.

(b) Develop procedures (including specific timelines) for monitoring and evaluating public agencies involved in that education of handicapped children. These procedures must include:

- (1) Collection of data and reports;
- (2) Conduct of on-site visits;
- (3) Audit of Federal fund utilization;

and

(4) Comparison of a sampling of individualized education programs with the programs actually provided.

(20 U.S.C. 1412(6); 1413.a(11))

Comment: In carrying out the requirements of paragraph (b) of this section, State educational agencies could include additional procedures, such as involving parents or representatives of parent organizations in on-site visits and other monitoring activities.

§ 121a.602 Adoption of complaint procedures.

(a) Each State educational agency shall adopt effective procedures for reviewing, investigating, and acting on any allegations of substance, which may be made by public agencies, or private individuals, or organizations, of actions taken by any public agency that are contrary to the requirements of this part.

(b) In carrying out the requirements in paragraph (a) of this section, the State educational agency shall:

(1) Designate specific individuals within the agency who are responsible for implementing the requirements;

(2) Provide for negotiations, technical assistance activities, and other remedial action to achieve compliance; and

(3) Provide for the use of sanctions, including the withholding of Part B funds in accordance with § 121a.194.

(20 U.S.C. 1412(6))

USE OF FUNDS

§ 121a.620 Federal funds for State administration.

A State may use five percent of the total State allotment in any fiscal year under Part B of the Act, or \$200,000, whichever is greater, for administrative costs related to carrying out sections 612 and 613 of the Act. However, this amount cannot be greater than the amount which the State may use under § 121a.704 or § 121a.705, as the case may be.

(20 U.S.C. 1411 (b), (c))

§ 121a.621 Allowable costs.

(a) The State educational agency may use funds under § 121a.620 of this Subpart for:

(1) Administration of the annual program plan and for planning at the State level, including planning, or assisting in the planning, of programs or projects for the education of handicapped children;

(2) Approval, supervision, monitoring, and evaluation of the effectiveness of local programs and projects for the education of handicapped children;

(3) Technical assistance to local educational agencies with respect to the requirements of this part;

(4) Leadership services for the program supervision and management of special education activities for handicapped children; and

(5) Other State leadership activities and consultative services.

(b) The State educational agency shall use the remainder of its funds under § 121a.620 in accordance with § 121a.370 of Subpart C.

(20 U.S.C. 1411 (b), (c))

STATE ADVISORY PANEL

§ 121a.650 Establishment.

(a) Each State shall establish, in accordance with the provisions of this subpart, a State advisory panel on the education of handicapped children.

(b) The advisory panel must be appointed by the Governor or any other official authorized under State law to make those appointments.

(c) If a State has an existing advisory panel that can perform the functions in § 121a.652, the State may modify the existing panel so that it fulfills all of the requirements of this subpart, instead of establishing a new advisory panel.

(20 U.S.C. 1413(a)(12))

§ 121a.651 Membership.

(a) The membership of the State advisory panel must be composed of persons involved in or concerned with the education of handicapped children. The membership must include at least one person representative of each of the following groups:

- (1) Handicapped individuals.
- (2) Teachers of handicapped children.
- (3) Parents of handicapped children.
- (4) State and local educational officials.
- (5) Special education program administrators.

(b) The State may expand the advisory panel to include additional persons in the groups listed in paragraph (a) of this section and representatives of other groups not listed.

(20 U.S.C. 1413(a)(12))

Comment. The membership of the State advisory panel, as listed in paragraphs (a) (1)-(5), is required in section 613(a)(12) of the Act. As indicated in paragraph (b), the composition of the panel and the number of members may be expanded at the discretion of the State. In adding to the membership, consideration could be given to having:

- (1) An appropriate balance between professional groups and consumers (i.e., parents, advocates, and handicapped individuals);
- (2) Broad representation within the consumer-advocate groups, to insure that the interests and points of view of various parents, advocates and handicapped individuals are appropriately represented;
- (3) Broad representation within professional groups (e.g., (a) regular education personnel, (b) special educators, including teachers, teacher trainers, and administrators, who can properly represent various dimensions in the education of handicapped children, and (c) appropriate related services personnel); and
- (4) Representatives from other State advisory panels (such as vocational education).

If a State elects to maintain a small advisory panel (e.g., 10-15 members), the panel itself could take steps to insure that it (1) consults with and receives inputs from var-

ious consumer and special interest professional groups, and (2) establishes committees for particular short-term purposes composed of representatives from those input groups.

§ 121a.652 Advisory panel functions.

The State advisory panel shall:

(a) Advise the State educational agency of unmet needs within the State in the education of handicapped children;

(b) Comment publicly on the State annual program plan and rules or regulations proposed for issuance by the State regarding the education of handicapped children and the procedures for distribution of funds under this part; and

(c) Assist the State in developing and reporting such information and evaluations as may assist the Commissioner in the performance of his responsibilities under section 618.

(20 U.S.C. 1413(a)(12))

§ 121a.653 Advisory panel procedures.

(a) The advisory panel shall meet as often as necessary to conduct its business.

(b) By July 1 of each year, the advisory panel shall submit an annual report of panel activities and suggestions to the State educational agency. This report must be made available to the public in a manner consistent with other public reporting requirements under this part.

(c) Official minutes must be kept on all panel meetings and shall be made available to the public on request.

(d) All advisory panel meetings and agenda items must be publicly announced prior to the meeting, and meetings must be open to the public.

(e) Interpreters and other necessary services must be provided at panel meetings for panel members or participants. The State may pay for these services from funds under § 121a.620.

(f) The advisory panel shall serve without compensation but the State must reimburse the panel for reasonable and necessary expenses for attending meetings and performing duties. The State may use funds under § 121a.620 for this purpose.

(20 U.S.C. 1413(a)(12))

Subpart G—Allocation of Funds;
Reports

ALLOCATIONS

§ 121a.700 Special definition of the term
State.

For the purposes of § 121a.701, § 121a.702, and §§ 121a.704-121a.708, the term "State" does not include Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(20 U.S.C. 1411(a)(2))

§ 121a.701 State entitlement; formula.

(a) The maximum amount of the grant to which a State is entitled under section 611 of the Act in any fiscal year is equal to the number of handicapped children aged three through 21 in the State who are receiving special education and related services, multiplied by the applicable percentage, under paragraph (b) of this section, of the average per pupil expenditure in public elementary and secondary schools in the United States.

(b) For the purposes of the formula in paragraph (a) of this section, the applicable percentage of the average per pupil expenditure in public elementary and secondary schools in the United States for each fiscal year is:

- (1) 1978—5 percent,
- (2) 1979—10 percent,
- (3) 1980—20 percent,
- (4) 1981—30 percent, and
- (5) 1982, and for each fiscal year after 1982, 40 percent.

(20 U.S.C. 1411(a)(1))

(c) For the purposes of this section, the average per pupil expenditure in public elementary and secondary schools in the United States, means the aggregate expenditures during the second fiscal year preceding the fiscal year for which the computation is made (or if satisfactory data for that year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the

United States (which, for the purpose of this section, means the fifty States and the District of Columbia), plus any direct expenditures by the State for operation of those agencies (without regard to the source of funds from which either of those expenditures are made), divided by the aggregate number of children in average daily attendance to whom those agencies provided free public education during that preceding year.

(20 U.S.C. 1411(a)(4))

§ 121a.702 Limitations and exclusions.

(a) In determining the amount of a grant under § 121a.701 of this subpart, the Commissioner may not count:

(1) Handicapped children in a State to the extent that the number of those children is greater than 12 percent of the number of all children aged five through 17 in the State; and

(2) [Reserved]

(3) Handicapped children who are counted under section 121 of the Elementary and Secondary Education Act of 1965.

(b) For the purposes of paragraph (a) of this section, the number of children aged five through 17 in any State shall be determined by the Commissioner on the basis of the most recent satisfactory data available to him.

(20 U.S.C. 1411(a)(5))

[42 FR 42476, Aug. 23, 1977, as amended at 42 FR 65083, Dec. 29, 1977]

§ 121a.703 Ratable reductions.

(a) *General.* If the sums appropriated for any fiscal year for making payments to States under section 611 of the Act are not sufficient to pay in full the total amounts to which all States are entitled to receive for that fiscal year, the maximum amount which all States are entitled to receive for that fiscal year shall be ratably reduced. In case additional funds become available for making payments for any fiscal year during which the preceding sentence is applicable, those reduced amounts shall be increased on the same basis they were reduced.

(20 U.S.C. 1411(g)(1))

(b) *Reporting dates for local educational agencies and reallocations.*

(1) In any fiscal year in which the State entitlements have been ratably reduced, and in which additional funds have not been made available to pay in full the total of the amounts under paragraph (a) of this section, the State educational agency shall fix dates before which each local educational agency shall report to the State the amount of funds available to it under this part which it estimates it will expend.

(2) The amounts available under paragraph (a)(1) of this section, or any amount which would be available to any other local educational agency if it were to submit an application meeting the requirements of this part, which the State educational agency determines will not be used for the period of its availability, shall be available for allocation to those local educational agencies, in the manner provided in § 121a.707, which the State educational agency determines will need and be able to use additional funds to carry out approved programs.

(20 U.S.C. 1411(g)(2))

§ 121a.704 Hold harmless provision.

No State shall receive less than the amount it received under Part B of the Act for fiscal year 1977.

(20 U.S.C. 1411(a)(1))

§ 121a.705 Within-State distribution: fiscal year 1978.

Of the funds received under § 121a.701 of this subpart by any State for fiscal year 1978:

(a) 50 percent may be used by the State in accordance with the provisions of § 121a.620 of Subpart F and § 121a.370 of Subpart C, and

(b) 50 percent shall be distributed to local educational agencies in the State in accordance with § 121a.707.

(20 U.S.C. 1411(b)(1))

§ 121a.706 Within-State distribution: fiscal year 1979 and after.

Of the funds received under § 121a.701 by any State for fiscal year 1979, and for each fiscal year after fiscal year 1979:

(a) 25 percent may be used by the State in accordance with § 121a.620 of Subpart F and § 121a.370 of Subpart C, and

(b) 75 percent shall be distributed to the local educational agencies in the State in accordance with § 121a.707.

(20 U.S.C. 1411(c)(1))

§ 121a.707 Local educational agency entitlements: formula.

From the total amount of funds available to all local educational agencies, each local educational agency is entitled to an amount which bears the same ratio to the total amount as the number of handicapped children aged three through 21 in that agency who are receiving special education and related services bears to the aggregate number of handicapped children aged three through 21 receiving special education and related services in all local educational agencies which apply to the State educational agency for funds under Part B of the Act.

(20 U.S.C. 1411(d))

§ 121a.708 Reallocation of local educational agency funds.

If a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by the local agency with State and local funds otherwise available to the local agency, the State educational agency may reallocate funds (or portions of those funds which are not required to provide special education and related services) made available to the local agency under § 121a.707, to other local educational agencies within the State which are not adequately providing special education and related services to all handicapped children residing in the areas served by the other local educational agencies.

(20 U.S.C. 1414(e))

§ 121a.709 Payments to Secretary of Interior.

(a) The Commissioner is authorized to make payments to the Secretary of

the Interior according to the need for that assistance for the education of handicapped children on reservations serviced by elementary and secondary schools operated for Indian children by the Department of the Interior.

(b) The amount of those payments for any fiscal year shall not exceed one percent of the aggregate amounts available to all States for that fiscal year under Part B of the Act.

(20 U.S.C. 1411(f)(1))

§ 121a.710 Entitlements to jurisdictions.

(a) The jurisdictions to which this section applies are Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(b) Each jurisdiction under paragraph (a) of this section is entitled to a grant for the purposes set forth in section 601(c) of the Act. The amount to which those jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 percent of the aggregate of the amounts available to all States under this part for that fiscal year. Funds appropriated for those jurisdictions shall be allocated proportionately among them on the basis of the number of children aged three through twenty-one in each jurisdiction. However, no jurisdiction shall receive less than \$150,000, and other allocations shall be ratably reduced if necessary to insure that each jurisdiction receives at least that amount.

(c) The amount expended for administration by each jurisdiction under this section shall not exceed 5 percent of the amount allotted to the jurisdiction for any fiscal year, or \$35,000, whichever is greater.

(20 U.S.C. 1411(e))

REPORTS

§ 121a.750 Annual report of children served—report requirement.

(a) The State educational agency shall report to the Commissioner no later than April 1 of each year the number of handicapped children aged three through 21 residing in the State who are receiving special education and related services.

(b) The State educational agency shall submit the report on forms provided by the Commissioner.

(20 U.S.C. 1411(a)(3))

Comment. It is very important to understand that this report and the requirements that relate to it are solely for allocation purposes. The population of children the State may count for allocation purposes may differ from the population of children to whom the State must make available a free appropriate public education. For example, while section 611(a)(5) of the Act limits the number of children who may be counted for allocation purposes to 12 percent of the general school population aged five through seventeen, a State might find that 14 percent (or some other percentage) of its children are handicapped. In that case, the State must make free appropriate public education available to all of those handicapped children.

§ 121a.751 Annual report of children served—information required in the report.

(a) In its report, the State educational agency shall include a table which shows:

(1) The number of handicapped children receiving special education and related services on October 1 and on February 1 of that school year, and the average of the numbers for those two dates;

(2) The number of those handicapped children within each disability category, as defined in the definition of "handicapped children" in § 121a.5 of Subpart A; and

(3) The number of those handicapped children within each of the following age groups:

- (i) Three through five;
- (ii) Six through seventeen; and
- (iii) Eighteen through twenty-one.

(b) A child must be counted as being in the age group corresponding to his or her age on the date of the count: October 1 or February 1, as the case may be.

(c) The State educational agency may not report a child under more than one disability category.

(d) If a handicapped child has more than one disability, the State educational agency shall report that child in accordance with the following procedure:

- (1) A child who is both deaf and blind must be reported as "deaf-blind."
- (2) A child who has more than one disability (other than a deaf-blind child) must be reported as "multihandicapped."

(20 U.S.C. 1411(a)(3); 1411(a)(5)(A)(ii); 1418(b))

§ 121a.752 Annual report of children served—certification.

The State educational agency shall include in its report a certification signed by an authorized official of the agency that the information provided is an accurate and unduplicated count of handicapped children receiving special education and related services on the dates in question.

(20 U.S.C. 1411(a)(3); 1417(b))

§ 121a.753 Annual report of children served—criteria for counting children.

(a) The State educational agency may include handicapped children in its report who are enrolled in a school or program which is operated or supported by a public agency, and which either:

- (1) Provides them with both special education and related services; or
- (2) Provides them only with special education if they do not need related services to assist them in benefitting from that special education.

(b) The State educational agency may not include handicapped children in its report who:

- (1) Are not enrolled in a school or program operated or supported by a public agency;
- (2) Are not provided special education that meets State standards;
- (3) Are not provided with a related service that they need to assist them in benefitting from special education;
- (4) Are counted by a State agency under section 121 of the Elementary and Secondary Education Act of 1965, as amended; or
- (5) Are receiving special education funded solely by the Federal Government. However, the State may count children covered under § 121a.186(b) of Subpart B.

(20 U.S.C. 1411(a)(3); 1417(b))

Comment. 1. Under paragraph (a), the State may count handicapped children in a Head Start or other preschool program operated or supported by a public agency if those children are provided special education that meets State standards.

2. "Special education," by statutory definition, must be at no cost to parents. As of September 1, 1978, under the free appropriate public education requirement, both special education and related services must be at no cost to parents.

There may be some situations, however, where a child receives special education from a public source at no cost, but whose parents pay for the basic or regular education. This child may be counted. The Office of Education expects that there would only be limited situations where special education would be clearly separate from regular education—generally, where speech therapy is the only special education required by the child. For example, the child might be in a regular program in a parochial or other private school but receiving speech therapy in a program funded by the local educational agency. Allowing these children to be counted will provide incentives (in addition to complying with the legal requirement in section 613(a)(4)(A) of the Act regarding private schools) to public agencies to provide services to children in private schools, since funds are generated in part on the basis of the number of children provided special education and related services. Agencies should understand, however, that where a handicapped child is placed in or referred to a public or private school for educational purposes, special education includes the entire educational program provided to the child. In that case, parents may not be charged for any part of the child's education.

A State may not count Indian children on or near reservations and children on military facilities. If it provides them no special education. If a State or local educational agency is responsible for serving these children, and does provide them special education and related services, they may be counted.

§ 121a.754 Annual report of children served—other responsibilities of the State educational agency.

In addition to meeting the other requirements in this subpart, the State educational agency shall:

- (a) Establish procedures to be used by local educational agencies and other educational institutions in counting the number of handicapped children receiving special education and related services;

(b) Set dates by which those agencies and institutions must report to the State educational agency to insure that the State complies with § 121a.750(a);

(c) Obtain certification from each agency and institution that an unduplicated and accurate count has been made;

(d) Aggregate the data from the count obtained from each agency and institution, and prepare the reports required under this subpart; and

(e) Insure that documentation is maintained which enables the State and the Commissioner to audit the accuracy of the count.

(20 U.S.C. 1411(a)(3); 1417(b))

Comment. States should note that the data required in the annual report of children served are not to be transmitted to the Commissioner in personally identifiable form. States are encouraged to collect these data in non-personally identifiable form.

APPENDIX A—[RESERVED]

APPENDIX B—INDEX TO PART 121a

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APPENDIX A—ANALYSIS OF FINAL REGULATION (45 CFR PART 121A) UNDER PART B OF THE EDUCATION OF THE HANDICAPPED ACT

These regulations set forth requirements to be followed by States and localities if they are to receive funds under Part B of the Education of the Handicapped Act. The regulations cover matters such as the identification, location, and evaluation of handicapped children; the provision of free appropriate public education; the establishment of a full educational opportunity goal; the count of handicapped children for allocation purposes; priorities in the use of Part B funds; the proper use of Part B funds; the development of an individualized education program; the creation of a comprehensive personnel development system; procedural safeguards (e.g. right to notice and conduct of hearings); methods to guarantee public participation; and details about State annual program plans and local educational agency applications.

RELATIONSHIP BETWEEN REGULATIONS UNDER PART B AND REGULATIONS UNDER SECTION 504

The regulations under section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84; published at 42 FR 22675; May 4, 1977) deal with nondiscrimination on the basis of handicap and basically require that recipients of Federal funds provide equal opportunities to handicapped persons (for example, that they meet the needs of handicapped persons to the same extent that the needs of nonhandicapped persons are met). Subpart D of the section 504 regulations ("Preschool, Elementary, and Secondary Education") contains requirements very similar to those in Part B of the Education of the Handicapped Act.

Basically, both require that handicapped persons be provided a free appropriate public education; that handicapped students be educated with nonhandicapped students to the extent appropriate; that educational agencies identify and locate all unserved handicapped children; that evaluation procedures be adopted to insure appropriate classification and educational services; and that procedural safeguards be established.

In several respects, however, the section 504 regulations are broader in coverage than Part B. For example, the definition of "handicapped person" and "qualified handicapped person" under section 504 covers a broader population than the definition of "handicapped children" under Part B. Under the Part B definition, a handicapped child is a child who has one of the impairments listed in the Act, who because of that impairment requires special education and related services. Under section 504, a handi-

capped person is a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of that type of impairment, or is regarded as having that impairment (84.3(j)).

The regulations for section 504 also deal with a number of subjects not covered by the Part B regulations (for example, barrier-free facilities and program accessibility; employment; postsecondary education and health, welfare and social services). On the other side, Part B contains a substantial number of administrative requirements not included under section 504 (for example, annual program plans and local applications) and requires more detailed procedures and policies in many instances (such as due process procedures).

In several instances, the section 504 regulations specifically reference where a requirement may be met by complying with a requirement under Part B. For example, § 84.33(b)(2), dealing with appropriate education, cites implementation of an individualized education program as one means of meeting the requirement. Section 81.33(d) has a September 1, 1978 outside date for providing an appropriate education to qualified handicapped persons (conforming to the timelines in Part B). Section 84.35(d) indicates that a reevaluation procedure consistent with the Part B requirements is one means of meeting the reevaluation requirements under section 504. Section 84.36, dealing with due process requirements, indicates that compliance with the procedural safeguards in Part B is one means of meeting those requirements.

It should be noted that the term "free appropriate public education" (FAPE) has different meanings under Part B and section 504. For example, under Part B, "FAPE" is a statutory term which requires special education and related services to be provided in accordance with an individualized education program. However, under section 504, each recipient must provide an education which includes "the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met . . ."

There is also a major difference between Part B and the section 504 regulations concerning the matter of exclusion of handicapped children from school. As of the effective date of the section 504 regulations (June 3, 1977), exclusion of handicapped children from school constitutes a violation of those requirements. However, under Part B, States are not required to serve all handicapped children aged 3-18 until September 1, 1978. As stated in Appendix A of the section 504 regulations:

The EHA requires a free appropriate education to be provided to handicapped children "no later than September 1, 1978," but section 504 contains no authority for delaying enforcement. To resolve this problem, a new paragraph (d) has been added to § 84.33. Section 84.33(d) requires recipients to achieve full compliance with the free appropriate public education requirements of § 84.33 as expeditiously as possible, but in no event later than September 1, 1978. The provision also makes clear that, as of the effective date of this regulation, no recipient may exclude a qualified handicapped child from its educational program. This provision against exclusion is consistent with the order of providing services set forth in section 612(3) of the EHA, which places the highest priority on providing services to handicapped children who are not receiving an education.

PART 121a—ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

SUBPART A—GENERAL

Subpart A sets forth the purposes and applicability of these regulations and includes definitions of statutory terms (e.g. free appropriate public education, special education, and related services) and other definitions related to those terms.

The following comments were received regarding Subpart A.

APPLICABILITY OF REGULATIONS TO STATE, LOCAL AND PRIVATE AGENCIES (§ 121a.2)

Comment: A commenter felt that the statement regarding the applicability of the regulations was not clear, and should be revised to indicate that the requirements apply to any public agency serving handicapped children, even if the agency does not receive Part B funds.

Response: A definition of "public agency" has been added to the regulations. The definition includes all political subdivisions in the State that are responsible for educating handicapped children. Throughout the regulation, the term "public agency" has been used to make it clear where the requirements do not apply only to State and local educational agencies. In addition, an explanatory comment was added after section 121a.2 to make it clear that the requirements under Part B are binding on each public agency in the State that has direct or delegated authority for the education of handicapped children, regardless of whether that agency receives Part B funds.

DEFINITIONS (§§ 121a.4–121a.15)

Comment: Hundreds of comments were received regarding definitions in the proposed rules. Commenters requested that new defi-

nitions be added, or sought changes in existing definitions, especially definitions of various disability categories and the various types of related services. In many instances, revisions were sought to conform to the most recent definitions adopted or used by professional associations.

Response: Definitions of terms used in the regulations are taken from various statutes, Congressional reports, or materials provided by professional associations and other groups. Where appropriate, the Office of Education has attempted to incorporate changes recommended by commenters, and has made other changes to clarify the definitions. In addition, the following new terms were added:

Definitions of "deaf-blind" and "multi-handicapped" were added because these are recognized categories of handicapped children in most States.

A definition of "qualified" was added in order to be able to use a consistent term in referring to the qualifications of the various personnel.

The definition of "handicapped children" has been modified only by making certain clarifying changes. Although some commenters requested additional changes in the definitions of the various disability categories, it is felt that the definitions in this regulation must closely conform to current usage in the States and professions.

The related services definition was expanded to include "school health services." In addition, changes were made in the definitions of the individual terms included under "related services" (e.g., psychological services and recreation) to conform to recommendations of professional associations.

SUBPART B—STATE ANNUAL PROGRAM PLANS AND LOCAL APPLICATIONS

Subpart B includes the requirements relating to State annual program plans, local educational agency applications, participation by the Bureau of Indian Affairs, and public participation.

Two new sections (section 121a.150 and 121a.239) have been added to require assurances from the State educational agencies and local educational agencies that the program under Part B will be operated in compliance with the section 504 regulations, including the requirements under section 608 of the Education of the Handicapped Act regarding employment of qualified handicapped individuals in programs assisted under the Act. (The Office for Civil Rights has been delegated authority for enforcing section 606.)

A substantial number of commenters were concerned with the following major issues in this subpart: (1) the amount of data required of State and local educational agencies; (2) the excess costs, nonsupplanting

and comparability requirements; and (3) the public participation requirements. In addition, as with other subparts, many commenters objected to statutory requirements and sought interpretations of the statute and regulations.

ANNUAL PROGRAM PLANS

CONDITION OF ASSISTANCE (§ 121a.110)

Section 434(b) of the General Education Provisions Act (GEPA), as amended by Pub. L. 93-380, requires each State to submit (1) a general application containing five assurances, and (2) an annual program plan for each Office of Education program under which funds are provided to local educational agencies through, or under the supervision of, the State educational agency. Under Section 434(b), and the implementing regulations (45 CFR 100b, Subpart B), the general application and an annual program plan take the place of a State plan for Part B (45 CFR 100b.19).

The five assurances required under section 434(b) of the GEPA cover proper administration, fiscal control and accounting, reports, supplanting, and submission of the annual program plan. Where Part B contains plan requirements covering the same subject matters, submission of those plans requirements is satisfied by the State's submission of the general application. They do not have to be submitted as part of the annual plan. The Part B plan provisions which do not have to be submitted in the annual program plan are referenced in 45 CFR § 100b.17(c)(2)(iv). Note that a substantive section on the nonsupplanting requirement for local educational agencies is set out in § 121a.230.

Under 45 CFR 100b.18(c), material may be incorporated by reference in an annual program plan if the material is in a document previously approved by the Commissioner and on file in the Office of Education. This should save some paperwork, particularly in the years after the first annual program plan (for school year 1977-1978) is submitted under these regulations.

The provisions to be included in the annual program plan for Part B are set forth in §§ 121a.120-121a.151 of these regulations (which include the conditions of eligibility and the State plan requirements under sections 612 and 613 of the Act and section 434(b)(1)(B)(ii) of the GEPA (which requires each annual program plan to "set forth a statement describing the purposes for which Federal funds will be expended during the fiscal year for which the annual program plan is submitted").

APPROVAL; DISAPPROVAL (§ 121a.113)

The following is clarification about the submission of draft annual program plans

for review by the Office of Education and how this would affect the issuance of grant award documents:

A State educational agency may elect to send a copy of its proposed annual program plan to the Commissioner for technical assistance purposes at the same time that the plan is being made available for public comment. However, funds cannot be obligated by a State before the date on which its official adopted plan is received in substantially approvable form by the Federal Government. (See 45 CFR 100b.35.)

EXAMPLE: A State educational agency's proposed plan for a particular school year is received by the Bureau of Education for the Handicapped on June 1. Its official plan is received on August 1. When BEH approves the plan (e.g. September 1), the State educational agency will receive a grant award document which will show August 1, as the earliest date of obligation under that plan.

EFFECTIVE PERIOD OF ANNUAL PROGRAM PLAN (§ 121a.114)

The Office of Education is proposing to use the period July 1-June 30 for State annual program plans in those programs where appropriations become available for obligation by the Federal Government each July 1 (the so-called "advance funded" programs). The purpose of this is to meet the statutory requirement for an annual program plan covering a 12-month period and at the same time to conform as closely as possible to the regular school year. However, even if the proposed procedure is adopted, the obligational period of State and local agencies for funds from any fiscal year would not be changed. If a State submits its annual program plan and receives its grant on the earliest possible date (July 1), the funds are available for obligation at the State and local level for 27 months, subject to submission or extension of the annual program plan for the following year. (This period includes the 12-month carryover provision under the Tydings Amendment. See 45 CFR 100b.55 (Obligation by recipients).) For example, if a State received its grant for fiscal year 1978 on July 1, 1977, the funds would be available for obligation at the State and local level from July 1, 1977 through September 30, 1979. The rules which govern when an annual program plan becomes effective, and State and local authority to obligate the Federal funds are located in 45 CFR Part 100b, Subpart B.

PUBLIC PARTICIPATION (§ 121a.120)

Comment: Commenters wanted this section to be expanded to require the States to describe in detail a number of additional specific steps to be taken in complying with the public participation requirements of the

Act. For example, they wanted States to develop a roster of interested persons to whom plans and other documents would routinely be sent. The commenters felt that these steps would be necessary to insure full public participation.

Response: Requirements have been added (in §§ 121a.280 et seq.) to spell out in more detail the State's duties regarding public participation in development of the annual program plan (for example, indicating in the notice of public hearings of the plan the timetable for developing the final plan and submitting it to the Commissioner). A requirement has also been added to specify that the plan must be available for comment at least 30 days following the date notice is given.

Another revised section indicates that the public participation requirements for local educational agencies are to be comparable to those required of the State, except that public hearings are not required (§ 121a.234).

FULL EDUCATIONAL OPPORTUNITY GOAL REQUIREMENTS (§§ 121a.124-121a.126)

Comment: Commenters disagreed about the amount of data which should be required under this (and other) sections. Some commenters sought to have the regulations require a substantial amount of additional data (about the population of handicapped children and their placements) on the grounds that it is needed for effective monitoring. Others sought to have the amount of data to be reported substantially reduced as unnecessary and fulfilling no useful purpose.

Response: The final regulations eliminate the data requirements in proposed section 121a.24(a) for school year 1977-1978. Since the funds for FY 1978 became available for obligation by the Federal government on July 1, 1977, the States began submitting annual program plans for school year 1977-1978 before these regulations were published. Therefore, it would be inappropriate to impose a retroactive data requirement. No substantive change has been made in the data requirement for school years 1978-1979 and thereafter. The Office of Education believes that the remaining amount of data sought is necessary and adequate to provide information on what and how children are being served. Additional information may be sought on a case by case basis from each State where necessary to monitor compliance with Part B. In addition, requirements have been added to Subpart F to increase each State's monitoring and enforcement obligations.

Comment: Commenters requested that the data requirements regarding personnel needed to meet the full educational opportunity goal include various other profession-

als groups, such as physical therapists, or use terms currently accepted by the professions, such as "therapeutic recreation specialists" rather than "recreation therapists."

Response: These changes have been made to cover the various personnel who provide special education or related services and to use terms currently recognized by the appropriate professional associations.

LOCAL EDUCATIONAL AGENCY APPLICATIONS

PARENT INVOLVEMENT (§ 121a.226)

Comment: Commenters wanted the regulations to require the establishment of a parent advisory committee in each school district.

Response: No change has been made. Extensive public and parental participation is already required under sections 121a.226 and 121a.234.

EXCESS COST REQUIREMENTS (§§ 121a.182-121a.186)

Comment: A substantial number of commenters requested clarification and explanation of the excess cost requirement.

Response: The section on excess costs has been broken out into five sections for easier reading. Section 121a.184 specifies that a local educational agency must spend a certain minimum amount for the education of handicapped children before Part B funds may be used. A detailed example of determining the minimum amount follows revised section 121a.184.

NONSUPPLANTING AND COMPARABLE SERVICES (§§ 121a.230-121a.231)

Comment: A substantial number of commenters requested clarification of these requirements. Some commenters proposed detailed procedures and urged that the regulations require the reporting of a substantial amount of data to monitor compliance with these requirements. Some commenters felt the comparability requirement should be met by comparing expenses for regular and special education.

Response: These sections have been substantially revised to attempt to explain these requirements. Detailed procedures and reporting requirements are not adopted at this time because local educational agencies are otherwise required to maintain auditable records to document their compliance with these and other requirements.

Regarding nonsupplanting, the regulation provides that the requirement applies to total aggregate funds and particular costs. A local educational agency meets the requirement if (1) the total amount or average per capita amount of State and local school funds budgeted by the local educational

agency for expenditures in the current fiscal year for the education of handicapped children is at least equal to the total amount or average per capita amount of State and local school funds actually expended for their education in the most recent preceding fiscal year for which information is available. Allowances may be made for decreases in enrollment of handicapped children and unusually large amounts of funds expended for long-term purposes (construction); and (2) Part B funds are not used to displace State or local funds for any particular cost.

The statutory requirement for comparability is implemented by prohibiting a local educational agency from using funds under Part B to provide services to handicapped children, unless the agency uses State and local funds to provide services to those children which, taken as a whole, are at least comparable to services provided to other handicapped children in that local educational agency. This should insure that handicapped children who receive services with Part B funds are treated equally with handicapped children who do not receive services with Part B funds. It would be too difficult to make an objective comparison between special and regular education. The concern of the commenters who asked for this comparison should be met by the excess cost requirement, which provides that a local educational agency must spend a minimum amount, on the average, for each of its handicapped children.

Comment: Commenters requested that the regulations make it clear that the local applications must meet the requirements imposed on the State in Subpart B.

Response: A section has been added to make it clear that each local application must include additional procedures and other information which the State educational agency may require in order to meet the State annual program plan requirements in Subpart B. The requirement for local educational agencies to be consistent with the annual program plan is set forth in section 121a.236.

APPLICATION FROM SECRETARY OF INTERIOR (§§ 121a.260-121a.261)

These sections have been rewritten to clarify that the annual application by the Secretary of the Interior for schools operated for Indian children must meet the applicable requirements of section 614(a), include other material as agreed to by the Commissioner and the Secretary of the Interior, and meet monitoring and public participation requirements.

PUBLIC PARTICIPATION

See the comments on Section 121a.120.

SUBPART C—SERVICES

Subpart C contains regulations governing the major service components required under Part B of the Act. These include free appropriate public education, the full educational opportunity goal, priorities in the use of Part B funds, individualized education programs, direct services by the State educational agency, and the State comprehensive system of personnel development.

FREE APPROPRIATE PUBLIC EDUCATION

FREE APPROPRIATE PUBLIC EDUCATION REQUIREMENTS (§§ 121a.300-121a.303)

Comment: Commenters disagreed with the interpretation of "State law or practice" in the proposed regulations. Some commenters felt the exception to the requirement to make free appropriate public education (FAPE) available to children in the age ranges three through five and 18 through 21 applies only if State law (or a court order) specifically prohibits services, or only if the State's practice is to provide services to less than a majority of the State's handicapped children. Others felt the requirement does not apply to the lower and upper age ranges unless the State is in fact serving all nonhandicapped children in those age ranges.

Response: The requirement has been re-drafted to clarify the use of the exception and to insure at a minimum that handicapped children in any of these age ranges are served to the extent nonhandicapped children are served (to be consistent with nondiscrimination requirements under section 504).

Section 121a.300 ("Timeliness for free appropriate public education") breaks "practice" down by individual public agency, disability category, and age group. This revision is designed to maximize the number of handicapped children aged 3-5 and 18-21 who receive services. It should reduce the reluctance of agencies wishing to serve children in those age groups, because services to a few handicapped children will not require services to all handicapped children in all of the disabilities.

Section 121a.300 also includes an amendment designed to insure that each time a public agency elects to serve a handicapped child, the child receives the full range of rights and services, whether or not FAPE is mandated for that age range.

FREE APPROPRIATE PUBLIC EDUCATION METHODS AND PAYMENTS (§§ 121a.301-121a.303)

Comment: Commenters disagreed on which agencies or parties should bear the costs of educating a handicapped child, especially room and board costs. Commenters sought clarification of when the costs must

be borne by the State or local educational agency.

Response: The proposed regulation on methods and costs for FAPE (proposed § 121a.201) has been redrafted and expanded as follows:

(1) A new paragraph has been added to section 121a.301, which states: "Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a handicapped child."

(2) Section 121a.302 states that if placement in a public or private residential program is necessary to provide FAPE to a handicapped child, the program (including non-medical care and room and board) must be at no cost to the child's parents.

Both of these changes have been made to conform to the regulations implementing section 504.

Other Changes: A new section 121a.303 has been added regarding the proper functioning of hearing aids. This section is based on a special study conducted by the Office of Education ("The Condition of Hearing Aids as Worn by Children in Public Schools," GPO-publication date Summer, 1977).

FULL EDUCATIONAL OPPORTUNITY GOAL (§§ 121a.304-121a.306)

The statutory terms "free appropriate public education" and "full educational opportunity goal" are distinguished in this regulation as follows:

"Free appropriate public education" (FAPE) must (1) be made available to all handicapped children within the mandated time lines and age ranges set forth in the Act, and (2) include special education and related services which are provided in accordance with an individualized education program.

"Full educational opportunity goal" is broader in scope than "FAPE." It is an all-encompassing term, which (1) covers all handicapped children aged birth through twenty-one, (2) includes a basic planning dimension (including making projections of the estimated numbers of handicapped children), (3) permits each agency to establish its own timetable for meeting the goal, and (4) calls for the provision of additional facilities, personnel, and services to further enrich a handicapped child's educational opportunity beyond that mandated under the "FAPE" requirement. The term "goal" means an end to be sought. However, while an agency may never achieve its goal in the absolute sense, it must be committed to implementing this provision, and must be in compliance with the policies and procedures in the Annual Program Plan under this provision. Further, the agency is not relieved from its obligations under the "FAPE" requirement.

The proposed rule on full educational opportunity goal has been revised as follows:

Proposed paragraph (a) (Program options) is now § 121a.305 and proposed paragraph (b) (Non-academic services) is now § 121a.306. A new § 121a.304 has been added which (1) requires each State educational agency to insure that each public agency establishes and implements a goal of providing full educational opportunity to all handicapped children, and (2) authorizes State and local educational agencies to use Part B funds to provide the facilities, personnel and services necessary to meet the goal.

A comment has been added following section 121a.304 which points to Congressional interest in having artistic and cultural activities included in programs supported under this part, subject to the priorities.

Comment: Many commenters asked that additional areas be added to the program options requirement (e.g., leisure education, cultural and performing arts, and occupational education). Other commenters requested that the term "consumer and home-making education" be substituted for "home economics" in order to be consistent with the vocational education amendments of 1976 (Pub. L. 94-482).

Response: No substantive change was made in this requirement. The program options included are examples and the list is not exhaustive. Under the regulation implementing section 504, any program provided to nonhandicapped students must also be made available to handicapped pupils. The language conforming to the vocational education amendments was added.

Comment: Commenters requested that under the requirement on nonacademic services the term "cocurricular" be substituted for "extra curricular" and that intramural, extramural, and interscholastic athletics be included in order to insure consistent use of terminology as it applies nationally. Another commenter suggested that specific language be included regarding participation of visually handicapped persons.

Response: The suggested terms were not adopted. This section conforms to the language in the final regulations under section 504. Also, the suggested language on visually handicapped was not included. This requirement applies to all handicapped individuals, including those with visual handicaps.

PHYSICAL EDUCATION (§ 121a.307)

Comment: Some commenters felt that the section on physical education (PE) needed to be clarified, particularly the conditions under which a handicapped child would not be required to participate in the regular PE program, (e.g., the child (a) is enrolled full-time in a separate facility, (b) needs special-

ly designed PE, or (c) the parents and agency agree that the child should not participate). The main concern dealt with the parent-agency agreement, because it appeared to provide a loophole in which a child would not be required to participate in any PE activity.

Response: The statement on parent-agency agreement was deleted. With this change, a handicapped child attending a regular school would participate in the regular PE program, unless the child needs specially designed PE as prescribed in his or her individualized education program (IEP). Parent-agency agreement is inherent in the development of a child's IEP. The decision as to whether the child should be in the regular PE program or receive specially designed PE is made in the IEP meeting in which the parent and agency personnel are represented.

It should be noted that every handicapped child would participate in some type of PE activity. Specially designed PE could involve arrangements for a child to participate in some individual sport or physical activity (e.g., weight lifting, bowling, or an exercise or motor activity program).

Other changes: Proposed section 121a.204 (Incidental use of property) has been deleted.

PRIORITIES IN THE USE OF PART B FUNDS

As part of the provision on free appropriate public education, the law requires each State and local educational agency to establish priorities, first with respect to handicapped children not receiving an education (defined as "first priority children" in the regulations) and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education (defined as "second priority children"). The law further requires that, except for State administration funds, each State and local educational agency must use its full entitlement under part B "in accordance with the priorities." The regulations which implement these priority requirements are included in sections 121a.320-121a.324.

PRIORITIES (§ 121a.321)

Comment: Many commenters were concerned that first priority expenditures cannot be used for inservice training for personnel who can serve those students and stated that such inservice training activities may be an essential component toward achieving the first priority.

Response: The proposed rules have been redrafted and expanded in order to address the above concerns. A new section was added to make it clear that an agency may use Part B funds for inservice training con-

currently with placing a first priority child in school (in an interim program, if a component of the child's program is missing). However, the provision of inservice training may not be used as a pre-condition for service to the child.

The intent of Congress with respect to the education of first priority children is both long-standing (dating back to Pub. L. 93-380) and very clear, as reflected in the following statements:

(1) The Congress has a responsibility "... to see that all persons are assured equal opportunity. For handicapped children, this means, at the very least, that they must be educated ..." These funds must be focused in such a way that we are assured that handicapped children are provided their right to education." (Congressional Record—Senate, June 18, 1975, p. S10369)

(2) "First priority for spending under the legislation is to provide services for handicapped children who are not now being served. The flexible approach in the Conference Report with respect to the current fiscal year, fiscal year 1977 and fiscal year 1978 will allow for concentrations of moneys so that this priority can be met." (Congressional Record—House of Representatives, November 18, 1975, p. H12348)

(3) "There are millions of children with handicapping conditions who are receiving no services at all. And since we must have a place to start, it is appropriate that we give priority to those who are receiving no services at all first, and then try to reach those with the most severe handicaps who have traditionally received only minimal attention second." (Congressional Record—Senate, June 18, 1975, p. S10961)

Comment: Several commenters requested clarification regarding whether the requirements on the use of funds for priorities apply within or among local educational agencies (e.g., if an agency is serving all of its first priority children, could a State give that agency's entitlement to another agency which is not serving all of its first priority children?).

Response: No change has been made. The statute does not permit the State to take away a local educational agency's Part B funds solely because the local educational agency is serving all of its first priority children. For the limited circumstances where a local educational agency's funds may be reallocated, see section 121a.708.

Other changes: A new paragraph (c) has been added to section 121a.321, which provides that Part B funds cannot be used for preservice training. This addition was made to implement Congressional intent expressed in Senate Report No. 94-168, p. 34 (1975), in which it was stated that funds for preservice training are available under the

training program under Part D of the Act, and that Part B funds should not be used for this purpose.

INDIVIDUALIZED EDUCATION PROGRAM

The requirements on individualized education programs (IEPs) in Subpart C have been reorganized and redrafted substantially, based largely on comments received. (These sections have been renumbered, starting with section 121a.340.) A summary of these changes is included below:

(1) A definition of IEP has been added which states that the term "IEP" means a written statement on a handicapped child that is developed and implemented in accordance with sections 121a.341-121a.349 of Subpart C.

(2) The proposed section entitled, "Scope" has been deleted and the substance combined with the section on "State educational agency responsibility."

(3) The proposed section on "Local educational agency responsibility" has been replaced by two new sections ("When IEPs must be in effect" and "Meetings").

(4) The section on "Participants in meetings" has been redrafted to adopt essentially verbatim the language in the Act and to add a new paragraph on participation of evaluation personnel.

(5) The proposed section on "Parent participation" has been amended to include specific provisions regarding notifying parents about the IEP meetings.

(6) The substance under the proposed section on "Content of IEP" has been replaced with the statutory language.

(7) The proposed section on "Private school placements" has been reorganized into two sections to conform to the two groups of private school handicapped children in Subpart D, and has been expanded to spell out in more detail the responsibilities of State and local educational agencies in administering this provision.

(8) A new section was added, entitled, "IEP—accountability."

TIMING OF IEP MEETINGS (§§ 121a.342-121a.343)

Comment: Many commenters felt that the final rules should provide more flexibility to agencies in terms of when IEP meetings are conducted.

Response: The following changes were made in the proposed rules in an attempt to clarify this provision. First, the regulations now specify the dates on which IEPs must be in effect (October 1, 1977, and the beginning of each school year thereafter). Second, except for new handicapped children (those initially evaluated after October 1, 1977), the timing of meetings to develop, review and revise IEPs is left to the discre-

tion of each agency. (For a new handicapped child, a meeting must be held within thirty days of a determination that he or she needs special education.) The regulations are flexible on the schedule to be followed by public agencies in meeting the above dates.

PARTICIPANTS IN IEP MEETINGS (§121a.344)

Comment: A number of commenters recommended that personnel from specific disciplines be participants at IEP meetings (e.g., physicians, health care personnel, psychologists, and representatives from other agencies, such as Head Start). Some commenters felt that the meetings should include all direct service personnel who work with a handicapped child. Other commenters suggested cutting back on the number of people who participate.

Response: The final regulations only require the participants listed in the statute, except in the case of a child who has been evaluated for the first time. (NOTE: Participation of evaluation personnel in IEP meetings is covered under the next comment-response sequence.)

Generally, having a large group of people at an IEP meeting may be unproductive and very costly, and could essentially defeat the purpose of insuring active, open parent involvement.

While it is necessary to insure that all direct services personnel who work with a handicapped child are informed about and involved in implementing the child's IEP, this does not mean that they should attend the IEP meetings. The mechanism for insuring the involvement of all IEP implementers is left to the discretion of each agency (e.g., the child's teacher, or principal, or supervisor could have that responsibility). However, this is a basic administrative procedure which can be handled outside of the context of the IEP meeting.

The statute does not require all IEP implementers to be involved in the meetings. In fact, the definition of IEP in section 602(19) of the Act includes only four people (e.g., a special education provider or supervisor, the teacher, the parent, and the child, where appropriate). Moreover, it was the intent of Congress that IEP meetings generally be small. This position is reflected in the following statement by Senator Randolph in the June 18, 1975 Congressional Record:

In answer to my colleague, it was the intent, and I believe, I can speak for the subcommittee and the committee in this matter, that these meetings . . . be small meetings; that is, confined to those persons who have, naturally an intense interest in a particular child, i.e., the parent or parents, and in some cases the guardian of the child. Certainly the teacher involved or even more

than one teacher would be included. In addition, there should be a representative of the local educational agency who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children.

These are the persons that we thought might well be included. That is why we have called them "individualized planning conferences". We believe that they are worthwhile, and we discussed this very much as we drafted the legislation.

While very large IEP meetings might generally be inappropriate, there may be specific instances where additional participants are essential. In order to enable other persons to be included, the Office of Education retained a provision from the proposed rules which authorized the attendance of "other participants, at the discretion of the agency or parents."

Comment: Some commenters recommended that members of the evaluation team participate in IEP meetings.

Response: A new paragraph has been added which states, in effect, that an evaluation person must participate in any IEP meetings conducted for handicapped children who have been evaluated for the first time (i.e., the preplacement evaluation required under section 121a.531 of Subpart E). Since the meeting is intended to develop an education program for the child, it is essential that someone at the meeting be familiar with the child's evaluation.

Comment: Several commenters recommended that the representative of the agency be qualified in the disability area in which the IEP is written.

Response: A comment has been added following section 121a.344 which suggests (but does not require) that either the teacher or the agency representative should be qualified in the area of suspected disability. At the time of the meeting, the public agency may not yet have hired a person qualified to provide special education with respect to that suspected disability.

PARENT PARTICIPATION (§ 121a.345)

Comment: Some commenters stated that documenting efforts to involve parents would be difficult and time consuming. One commenter felt it was important to retain the general statement requiring agencies to involve parents, but recommended that the details in the parent participation section be deleted from the final regulation. Another commenter recommended that the section be dropped because it is not required in the law and is "utterly paternalistic. If a local education agency is foolish enough to keep inadequate records on transactions with parents, it alone stands in jeopardy; there is no damage to parents or to handicapped children."

Response: The comments have not been adopted. The Office of Education believes that it is important to retain this section in the final regulations, for the following reasons:

First, the section provides rules that allow agencies to proceed in conducting IEP meetings in cases where parents cannot or will not attend. Without this authorization, the IEP process might come to a halt in some cases, since the law states that an IEP must be developed at a meeting with the parents.

Second, the section is designed to protect agencies by setting the conditions under which they can proceed.

Third, the section is designed to protect the rights of the parents. The Congress intended that IEP meetings be utilized as an extension of the procedural protections guaranteed under Pub. L. 93-380. However, if the regulations provided an authorization for agencies to proceed without the parents, there is a potential problem that the authorization (without documentation) might be inappropriately applied in individual cases, which could result in parents' rights not being protected.

Comment: A few commenters suggested using surrogate parents if a child's parents could not attend an IEP meeting. One commenter recommended adding a provision to enable the parents to designate a person to represent them at a meeting.

Response: The Office of Education elected not to write regulations on either of these suggestions.

First, a surrogate parent is appointed only in accordance with the procedural safeguards in Subpart E. The provision was not meant to apply in situations when parents are unwilling to participate, or when an agency makes unsuccessful efforts to communicate with a known parent. A surrogate parent is appointed only when the parents are unknown, unavailable or the child is a ward of the State. However, a surrogate parent appointed under appropriate circumstances would attend the IEP meetings and represent the child in all matters relating to the provision of a free appropriate public education to the child.

Second, with respect to parent designated representatives, the Office of Education does not feel that any change in the regulation is warranted. Parents unable to attend an IEP meeting, who are interested enough in their child's education to seek a third party representative, would have direct input in developing the child's IEP through individual or conference telephone calls or other methods authorized under paragraph (c) of section 121a.345.

Other changes. A new paragraph (f) has been added to require that parents be given a copy of the IEP on request. This should help to insure that the parents are fully in

formed of the program for their child, and will assist them in participating in future meetings on the IEP.

CONTENT OF IEP (§ 121a.346)

Comment: Hundreds of commenters responded to this section. Some commenters requested that additional services or other items be added. Other commenters recommended that the section be sharply cut back, because they felt that this went unnecessarily beyond the items listed in the statute. Many of the commenters wanted the specific service areas they represent added to the list of services to be provided in the IEP. Others felt that this went unnecessarily beyond the items listed in the statute.

Response: The Office of Education has elected to amend this section by adopting substantially verbatim the language from section 602(19) of the Statute. The regulation retains one clarification from the proposed rules, that the individualized education program must include related services to be provided to the child, as well as special education and the extent to which the child can participate in regular education programs. However, given the controversy over this section and whether it is appropriate to add items not specifically covered in the statute, the Office of Education has decided that some experience operating under the statute would be useful before considering whether further regulations on this point would be appropriate.

IEP—ACCOUNTABILITY (§ 121a.349)

Comment: In the preamble to the proposed rules, a statement was made that the IEP is not a legally binding document. Many commenters recommended that this statement should be included in the body of the final regulations. Other commenters felt that the statement needed to be clarified.

Response: The Office of Education has added a new section, which states, in effect, that each public agency must provide special education and related services in accordance with a handicapped child's IEP. However, Part B does not require that the agency, the teacher, or other persons be held accountable if the child does not achieve the growth projected in the written statement.

COLLECTIVE BARGAINING

Comment: Numerous commenters recommended that the regulations deal with the fact that the required participation of teachers (and other agency staff) in the meetings to develop IEPs would require modification of collective bargaining agreements. Some commenters urged that the

regulations require additional compensation for teachers to participate in these meetings, prescribe or limit any after-school-hours participation, and specify arrangements for relieving teachers from classroom duties for the meetings.

Response: No change has been made in the regulation. The requirement for teacher participation in developing IEPs is statutory. The Commissioner understands that collective bargaining agreements and individual annual contracts for teachers vary greatly among local educational agencies and may or may not deal with additional duties and compensation for after-hour activities. In some instances, especially in urbanized and highly unionized areas, collective bargaining agreements may have to be renegotiated to cover employee participation in IEPs. However, this is an area which is solely within the authority of the public agency and its employees (and their union representative, if any). It would be inappropriate and beyond the scope of the Commissioner's authority to prescribe how this requirement must be met. Where collective bargaining agreements must be modified, the public agency must negotiate the appropriate modifications to comply with the statute. The public agency is also responsible for insuring that the IEP meetings are conducted at a time reasonably convenient to parents. (In some cases this may be during school hours; in others, after hours.) The agency also must make its own arrangements for covering classrooms when teachers are absent.

DIRECT SERVICES BY THE STATE EDUCATIONAL AGENCY

The direct services provision of this subpart includes sections on (1) use of local educational agency (LEA) funds, (2) nature and location of services, (3) use of the State's (SEA's) entitlement, and (4) a State matching requirement.

The section on the use of LEA allocations (renumbered section 121a.360) has been redrafted to combine the proposed paragraphs (a) and (b) into a single paragraph. This paragraph sets out the conditions under which an SEA may use an LEA's entitlement.

A new paragraph (b) has been added to section 121a.360, which states that in meeting the requirements of this section, the SEA may provide special education and related services directly, by contract, or through other arrangements.

A new paragraph (c) has been added, which repeats the statutory provision that the excess cost requirement does not apply to State educational agencies.

Section 121a.360 (Nature and location of services) has been amended to correct an error made in the proposed rule. The pro-

posed regulation stated that the least restrictive environment (LRE) provisions do not apply when the SEA provides direct services. The amended rule now states that the manner in which the education and services are provided must be consistent with the requirements of this part (including the LRE provisions).

The regulation on "State matching" was not substantially changed. However, a comment was added after this section to make it clear that the requirement would be satisfied if the State can document that the amount of State funds expended on each major program area (e.g., the comprehensive system of personnel development) is at least equal to the expenditure of Federal funds in that program area.

Comment: In the preamble to the proposed rules under the direct services provision, a point was made that an LEA would not be in compliance with the section 504 regulations if that agency did not make available a free appropriate public education (FAPE) to all of its handicapped children. A commenter, in responding to this statement, pointed out that the term FAPE has different meanings under section 504 and Pub. L. 94-142; and, therefore, an LEA would not have to meet the requirements of Pub. L. 94-142 in order to be in compliance with section 504.

Response: Under Part B, "FAPE" is a statutory term which requires services to be provided in accordance with an IEP. However, under the section 504 regulations, each recipient must provide an education which includes services that are "designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met" Those regulations state that implementation of an IEP, in accordance with Part B, is one means of meeting the "FAPE" requirement.

(Note.— A more detailed description of the relationship between section 504 and Pub. L. 94-142 is included in this appendix.)

Other changes: A new section 121a.372 has been added to implement section 611(c)(3) of the Act. This section provides that the nonsupplanting requirement does not apply to the State's expenditure of its allocation beginning with funds appropriated for Fiscal Year 1979 and for each following fiscal year.

COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT

GENERAL

The proposed rules in this section created some controversy over the amount of detail contained in the regulations. Comments ranged from requests for more specificity to suggestions that everything be deleted except the statutory language.

The statute is very clear in requiring that a "comprehensive system of personnel development" be implemented in each State. Since this is a broad requirement, challenging each State to reach out to the expansive community of agencies involved in preparing personnel to educate the handicapped, many of which are private and not under the control of the State, it was felt that a regulation was needed that would provide sufficient information for the State and involved agencies to understand their responsibilities in achieving compliance.

SCOPE OF SYSTEM (§ 121a.380)

Comment: A commenter suggested that inservice education be available to all special, regular, and related service personnel.

Response: Paragraph (a) of section 121a.380 was changed to read "the inservice training of general and special educational instructional, related services, and support personnel."

Comment: A commenter suggested that all personnel preparation services be conducted in accredited institutions granting advanced degrees and that "no less than ten percent of the money under this Act be contracted to institutions of higher education." Another commenter recommended the earmarking of a percentage of funds for staff and program development.

Response: No change has been made in the regulations. The Office of Education believes that each State must have maximum latitude in decisions regarding the types of facilities and personnel that are used to implement the comprehensive system of personnel development.

With respect to targeting funds for training, the Office of Education feels that such a step would be inappropriate at this time.

Part B is a unique Federal statute in that it imposes requirements on States which must be implemented, regardless of the amount of Federal funds available. Given the scope and magnitude of the law, the Office of Education believes that each State should have maximum latitude in terms of how its Part B funds are used to implement the various statutory provisions, subject, of course, to the priority requirements in Subpart C.

DEFINITION OF "APPROPRIATELY AND ADEQUATELY PREPARED AND TRAINED" (PROPOSED § 121a.261)

A number of comments were received on the definition of "appropriately and adequately prepared and trained" which was in § 121a.261 of the proposed rules. The definition has been deleted in the final regulations. Instead the term "qualified" is used, as defined in § 121a.12.

Comment: A commenter suggested that nationwide certification requirements be mandated to allow for the mobility of personnel.

Response: No change has been made. The intent of the Act is to insure that all personnel necessary to carry out the purposes of the Act are qualified. The Act does not authorize the establishment of national certification standards.

Comment: A commenter suggested that early childhood be required as an area for certification.

Response: No change has been made. These personnel must be included under the State's comprehensive personnel development system.

Comment: Several commenters expressed the belief that certification should not be required for all personnel directly serving the handicapped, or that such a requirement would result in great expense for the State. Still others felt that competency based systems should be used as opposed to the requirement for certification, registration, or licensing.

Response: The statutory language "appropriately and adequately prepared and trained" has been interpreted, by use of the term "qualified," to mean certification, registration, or licensing. These are commonly accepted procedures for determining if personnel are "appropriately and adequately prepared and trained."

PARTICIPATION OF OTHER AGENCIES AND INSTITUTIONS (§ 121a.381)

The comments on the level and intensity of the "participation" required in this section ranged from the belief expressed that special meetings on components of the State plan are not required in the Act, therefore the "participation" envisioned in section 121a.381 should be eliminated, to the suggested requirement that organizations not only have an opportunity to participate, but that they "must participate." The comprehensive system of personnel development is such a specialized aspect of the Act, necessarily involving agencies not under the jurisdiction of the State that "participation" is fully warranted, though not mandated in the statute. Thus, the regulations set a requirement for the State to insure that those agencies with an interest in the preparation of personnel for the education of the handicapped have an opportunity to participate fully in the development, review, and updating of the system. This is a reasonable requirement, especially considering the critical effect the system will have on those agencies preparing the personnel. Rather than a burden on the State, the "participation" should provide the direct opportunity for the State to encourage the development of quality personnel preparation

programs, a factor essential to the provision of a "free appropriate public education."

Comment: Several commenters suggested that "representatives from each group be included in the planning" as well as parents. One commenter suggested that disability categories and groups be listed in the proposed rule.

Response: The regulation has been altered to include representatives of handicapped and parent organizations. This wording should be sufficient to involve all relevant groups.

Comment: A commenter suggested the addition of a subsection (3) to section 121a.381(b) that would require the annual program plan to include a description of agency responsibilities with respect to research and evaluation of exemplary programs that could be implemented in local educational settings.

Response: Sections 121a.385 and 121a.386 have been modified to classify agency responsibilities.

INSERVICE TRAINING (§ 121a.382)

Comment: There were a number of contrasting points of view and suggestions on this section, ranging from requests to mandate greater detail in the proposed rules, to the suggestion that the section be deleted altogether. Those proposing greater detail suggested that specific knowledge and areas of learning be emphasized and that teachers be trained "by having them work one-to-one with specialists" and that "inservice training be mandated at the local level, a county being the largest unit possible, to prevent the State from using the money for ineffectual regional workshops." Also, there were suggestions that where academic credit is to be made available that this be done only in institutions of higher education with State approved programs.

On the other extreme there were suggestions that this section "exceeds statutory requirements" and "federal rules should not say how a task is accomplished" and "(state) provides adequate training and inservice and does not need more obstacles and regulations."

Response: The statute clearly requires inservice education as a central part of the comprehensive system of personnel development and it is appropriate for the rules to detail the nature and extent of the inservice education that is required. This has been accomplished through the outlining of procedures which define inservice education, its parameters, and relationship to required needs assessments. However, the rules do not define the specific nature of the training to be accomplished. Thus, the rules have been designed to outline the foundation for an adequate program of inservice education.

without stifling the creativity of State and local personnel in their efforts to plan and implement such a system.

Comment: A commenter suggested that the statement "in cooperation with institutions of higher education" be inserted in section 121a.383(b)(1).

Response: No change has been made. However, involvement of institutions of higher education is required under § 121a.381(a).

Comment: A number of commenters suggested the addition of specific disciplines and professionals to this section, constituting an itemized list of personnel to be trained or involved in the review of training needs.

Response: No change has been made. The State's plan must include all personnel who need training.

Comment: Several commenters suggested wording changes designed to clarify the text of the proposed rule on inservice training.

Response: Changes were made where necessary to bring the regulation into conformity with current usage.

Comment: There were a number of suggestions concerning the financial arrangements for conducting inservice training. Some commenters advocated the funding of parent groups to conduct inservice training. Others suggested financial support for trainees involved in their programs. One commenter urged that the rule allow for contracting with other than non-profit organizations. One suggested contracts with institutions of higher education to carry out personnel development programs. Another suggested incentive for teacher participation, including released time and college credit. One suggested that inservice be provided during contract time, not involving extra hours.

Response: No substantive changes have been made. All of the suggestions in the above comments are authorized under these regulations.

PERSONNEL DEVELOPMENT PLAN (§ 121a.383)

Comment: Several commenters asked for special attention to physical education and service delivery models which take into account problems of rural families.

Response: No change has been made. Specialized needs in physical education and the unique aspects of providing services in rural settings should be addressed as appropriate in the needs assessment and plan.

Comment: One commenter objected to including preservice training under this section.

Response: No change has been made. The term "inservice" education is used in the Act. However, since the Act clearly requires that a "comprehensive system of personnel development" be developed, such a system

must include the consideration of preservice training.

NOTE:—The data required in sections 121a.124 and 121a.126 of Subpart B on the numbers of handicapped children and the kind and number of personnel needed will serve as the uniform data base within the State for the personnel development system under § 121a.383 of this subpart. The data may also be used by institutions of higher education and other nonprofit educational training agencies in submitting personnel preparation applications under Part D of the Act. Section 121f.9 of the regulations under Part D (45 CFR 121f.9) provides as follows:

§ 121f.9 State personnel needs.

Each application shall include (a) a statement by the State educational agency of personnel needs for education of the handicapped and a statement by the applicant of how the proposed program relates to those stated needs, and (b) a description of the ways in which the recipient's program goals and objectives relate to the purposes of Part D of the Act.

(20 U.S.C. 1431, 1432, 1434)

DISSEMINATION (§ 121a.384)

Comment: One commenter suggested that "teachers organizations" be specified as recipients of information.

Response: No change has been made. Teacher organizations are included under the phrase "other interested agencies and organizations."

SUBPART D—PRIVATE SCHOOLS

The proposed rules created a certain amount of confusion among commenters in distinguishing between handicapped children placed in or referred to private schools by the State or by local educational agencies and handicapped children whose parents choose to educate them in private schools. The major difference between these two groups of children is in who bears the cost of the private school.

A free appropriate public education must be made available to each handicapped child by the public agencies of the State. Subject to the requirements on least restrictive environment, this could include placement in or referral to a private school or facility. Such a placement or referral must be at no cost to the parent.

On the other hand, even if a free appropriate public education is available, the parent may choose not to accept it. The parent may choose to send the child to a private school rather than take advantage of the free public education. If this happens, the Act does not require the State or

local educational agency to bear the cost of the private school. For children placed in private schools by their parents, the State and its local educational agencies have a different duty. They must design their program so that handicapped children in those private schools can participate in special education and related services offered by the local educational agencies if the parents of those children so desire.

The regulations have been reorganized to make these distinctions clearer. The first set of sections (121a.400-121a.403) now cover children placed in or referred to private schools or facilities by a public agency in order to provide them with special education or related services. (These sections replace sections 121a.320-121a.323 of the proposed rules.)

Since the "State" includes all of its political subdivisions, the term "public agency" is used, as elsewhere in the regulations, to mean all of the political subdivisions of the State which are responsible for providing special education or related services to handicapped children.

The second set of sections (121a.450-121a.460) apply to handicapped children enrolled in private schools or facilities but who are not placed or referred there by a public agency to receive special education or related services. (These sections replace sections 121a.300-121a.306 of the proposed rules.)

The following comments were made regarding proposed Subpart D. Comments which asked for changes not authorized under the statute are not summarized. (Commenters who are concerned about the cost of room and board as a "related service" are referred to section 121a.302 and the discussion of that section in this preamble.) The comments are arranged in order of the final rules.

RESPONSIBILITY OF STATE EDUCATIONAL AGENCY (§ 121a.401)

Comment: A commenter asked that paragraph (a)(3) be deleted, which required that the special education given to a handicapped child placed by a public agency must meet the education standards of the State educational agency (SEA). The commenter stated that otherwise there would be conflicts between the SEA's standards and those of other agencies, in the day care area, for example.

Response: Paragraph (a)(3) cannot be deleted, since it is derived from a statutory requirement. However, it has been revised by using the language of the statute. This will broaden the types of standards that the SEA may apply, and therefore avoid conflict with other mandatory standards. Of course, those standards cannot override the provisions in Part B of the Act.

Comment: A commenter asked that provision be made for interstate referrals to private schools and communication among States regarding those referrals.

Response: No change has been made in the regulation. Referrals between States are to be handled under existing procedures. Unless a problem develops in this area that seriously interferes with the rights of handicapped children or their parents under Part B, the Office of Education is reluctant to regulate the mechanisms by which the States arrange to provide services.

IMPLEMENTATION BY SEA (§ 121a.402)

Comment: A commenter suggested that the State educational agency insure the monitoring of private schools, dissemination of standards to them, and involving them in developing State standards, rather than the State educational agency doing it directly.

Response: No change has been made. The statute places direct responsibility on the State educational agency to administer and monitor the requirements under Part B. While the State educational agency in many areas need only insure that the Part B requirements are met, monitoring must be done by the agency itself. Dissemination of standards could be done in a variety of ways. Involvement in development of State standards would have to be done directly by the State educational agency if it is the agency that develops those standards.

PLACEMENT OF CHILDREN BY PARENTS (§ 121a.403)

Comment: Commenters were concerned with the effect of this section on the rights of handicapped children in private schools and felt that the section was worded in a manner that would limit those rights.

Response: The section has been revised to make it clear that a free appropriate public education (FAPE) must be made available to each handicapped child. This would include the development of an individualized education program and placement in the least restrictive environment. Free appropriate public education must be made available at no cost to the parents. If the parents felt that services were not adequate, they may have a due process hearing to show that more or better services must be provided to give their child FAPE. However, if the parents choose not to educate their child in the public school system, they are not required to do so. In that case the relevant public agency has the remaining duty of offering special education and related services under sections 121a.450-121a.460, but does not have the duty of insuring that the private school meets the requirements of Part B (unless other handicapped children have been placed in or referred to that private

school by the agency), or of paying for the cost of the private school. Language has been added to clarify the public agency's duties under sections 121a.450-121a.460.

Other changes: Proposed section 121a.323 (Placements in another State) has been deleted. It would have required private schools to meet the standards of both the sending and receiving States. This would have been an unreasonable burden on the receiving State to enforce.

**HANDICAPPED CHILDREN IN PRIVATE SCHOOLS
NOT PLACED OR REFERRED BY PUBLIC AGENCIES
(§§ 121a.450-121a.460)**

Comment: A number of commenters felt that clarification was needed in these sections. There was also some concern expressed regarding the State's legal authority to provide services to children enrolled in private schools.

Response: The regulations have been amended to conform more closely to those under Title I of the Elementary and Secondary Education Act of 1965 (education of educationally deprived children) (45 CFR, Section 116a.23). As under Title I, a balance is drawn between the statutory requirement to provide services, and the constitutional necessity of avoiding excessive entanglements between public agencies and church-related institutions. It is also important for the Office of Education to have a uniform policy regarding services to private school children under all Federal education programs it administers. The amendments to the proposed rules should serve all of these purposes.

SUBPART E—PROCEDURAL SAFEGUARDS

This subpart implements the procedural safeguards set forth in the Act, including due process procedures for parents and children, protection in evaluation procedures, least restrictive environment, confidentiality of information, and procedures of the Office of Education.

A substantial number of detailed comments were received on these sections. Many concerned the statute rather than the regulations or did not state what changes in the regulations were desired. Others requested revisions which did not appear to involve substantive changes. Some comments sought substantially more detailed specification of due process rights while others indicated that the statute itself was so detailed in the due process area that the regulations should not go beyond the statute.

As stated earlier in this preamble, the Office of Education's position, while incorporating a number of the suggestions in the final regulations, is still to adopt minimum regulations in this area at this time, review

experience under the regulations, and then made a determination as to whether more detailed regulations are required.

**DUE PROCESS PROCEDURES FOR PARENTS AND
CHILDREN**

DEFINITIONS (§ 121a.500)

Comment: Commenters recommended that the phrase "unless it is clearly not feasible to do so" be deleted from the definition of consent and that additions be made to make it clear that consent may be revoked and may not be made a precondition to the child's right to participate in basic educational programs. The effect of deleting the phrase would be to require that a consent is not valid unless the parent is informed in every case of the information relevant to the consent.

Response: The phrase has been deleted. The deletion of the phrase will help to assure an informed consent in every case, regardless of the parent's language or other mode of communication. A phrase has been added to make it clear that parents have the right to revoke consent. A separate section 121a.504 states that consent may not improperly be made a precondition of services. While public agencies must obtain consent for preplacement evaluations or for initial placement, a public agency may not coerce parents to consent by withholding or threatening to withhold other regular education services or extracurricular activities unless the parent consents.

Comment: Several commenters requested changes in the definition of "evaluation" to indicate that an evaluation must be conducted by qualified personnel, that the findings must be reduced to writing, and that it must take into account the child's assets as well as deficits.

Response: No change has been made. The suggestion regarding qualified personnel is covered under section 121a.532. The Office of Education expects that evaluations will be in writing and that a child's assets will be considered. If a problem develops in this area, the Office of Education will reconsider the necessity for further regulations.

**GENERAL RESPONSIBILITY OF PUBLIC AGENCIES
(§ 121a.501)**

Comment: Commenters suggested that parents have the right to complain and that agencies should be required to respond to them outside of the context of a hearing.

Response: No change has been made in the regulation. However, agencies should certainly seek to respond to complaints by informal discussions and negotiations. A comment section has been added which notes that mediation may be useful in some instances. In any case, negotiations may not delay a hearing if a parent has requested it.

INDEPENDENT EDUCATIONAL EVALUATION
(§ 121a.503)

Comment: Commenters disagreed as to whether the parent's right to an independent evaluation should be broadened or narrowed.

Response: The section has been rewritten to require public agencies to provide parents information, upon request, of where an independent educational evaluation may be obtained. Also, "public expense" has been defined. However, the interpretation in the proposed regulations is retained. The evaluation must be at public expense if the parent disagrees with the evaluation by the public agency, unless the public agency initiates a hearing to show that its evaluation is appropriate. If upheld, the expense of the independent evaluation does not have to be borne by the agency. The independent evaluation must be considered in any hearing.

There are several competing interests which the regulation seeks to balance. The statutory right of the parent to an independent educational evaluation must be preserved. On the other hand, the public agencies should not be asked to bear the costs of unreasonably expensive independent evaluations. Also, for the independent evaluation to be useful, it must meet the same criteria as evaluations conducted by public agencies under this part.

PRIOR NOTICE, PARENT CONSENT AND CONTENT
OF NOTICE (§§ 121a.504-121a.506)

Comment: Commenters sought further specificity as to the detail of information provided to parents in the notice. Other commenters felt that the requirements were too demanding. Some commenters asked that consent be required for preplacement evaluation and prior notice for reevaluation; and that consent be extended to include permission for placement. Other commenters sought to delete the consent requirement on the grounds that educational judgments should be final.

Response: The basic notice requirements in sections 121a.504 and 121a.505 were not changed. However, the following changes were made in the consent requirements:

(1) Consent was expanded to include permission for initial placement of a handicapped child in a special education program. Many commenters had requested this addition; and the Office of Education agrees that this requirement is as essential as consent for preplacement evaluation.

(2) The proposed consent rule was changed from consent for all evaluations to consent for the initial or preplacement evaluation. This change is essentially consistent with the section 504 final regulations (45 CFR Part 84, § 84.35(a)). The Office of Education agrees with commenters that there is

no need to require consent for reevaluation. If a handicapped child is initially placed in accordance with section 121a.504, and if his or her individualized education program is annually reviewed in accordance with section 121a.343 of Subpart C, a requirement is not necessary. However, prior notice would have to be provided.

Comment: Commenters were especially concerned that clarification be added regarding procedures for overriding parents' refusal to consent.

Response: A subsection has been added to set out procedures for dealing with parental refusal to consent (see section 121a.504(c) and the comment following that section).

The procedures are designed not to interfere with existing State laws which may require consent. Where State law does not require consent, the parent is afforded a due process hearing under this Part. These rules should provide protection to the parent, the child, and the public agency.

IMPARTIAL DUE PROCESS HEARING (§ 121a.508)

Comment: A commenter asked that the regulations specify that the public agency must pay for the hearing.

Response: The change requested by the commenter has not been made. Since the statute requires that the public agency must afford parents an opportunity for a hearing, the agency must bear the cost of the hearing, except for paying for parents' representatives and witnesses. However, section 121a.506 has been amended to require agencies to provide parents with information about free or low-cost legal and other relevant services that are available.

IMPARTIAL HEARING OFFICER (§ 121a.507)

Comment: Commenters sought to have three-person panels, including parents, serve as the hearing officials. Some sought to allow and others sought not to allow school board officials from serving as hearing officials. Commenters also asked that lists of hearing officers be required, including their qualifications.

Response: A requirement has been added that each public agency keep a list of persons who serve as hearing officers and a statement of their qualifications. This should help to ensure that the requirement for impartiality is met. No other substantive change has been made. A three-person panel could be used under the existing rules, as long as the conditions of impartiality are met. However, a parent of the child in question and school board officials are disqualified under section 121a.508.

HEARING RIGHTS (§ 121a.505)

Comment: Commenters disagreed as to whether hearing rights set forth in the pro-

posed rules should be expanded or restricted. Among the additional rights sought were the right to compel the attendance of witnesses, prohibit the introduction of evidence not disclosed prior to the hearing, allow the child to be present and the hearing to be open to the public at the parents' discretion, and to specify whether the record of the hearing must be free or at reasonable cost.

Response: The section has been revised to add rights for any party to prohibit the introduction of evidence not previously disclosed to the other party and for the child to be present and the hearing to be open to the public. The purpose of hearings under this part is to ensure that handicapped children are provided free appropriate public education. Opening up the hearing and the evidence that may be presented should serve to insure that the result of a hearing will be in the best interests of the child. No provision has been added relating to cost. However, it is expected that a copy of any decision would be provided to the parent at no cost.

HEARING DECISION; APPEAL (§ 121a.509)

Comment: A commenter sought to add a requirement that specifies that the hearing officer has the power to order any educational program for the child and that his or her power not be limited to accepting or rejecting the program by the public agency or parent.

Response: No change is necessary. The hearing officer has the function to decide what placement is appropriate, if that is the subject of the hearing.

ADMINISTRATIVE APPEAL; IMPARTIAL REVIEW (§ 121a.510)

Comment: Commenters disagreed on whether to reduce or expand the requirements in this section. Some commenters wanted short, specific timelines set out for various actions and specification of the rights that apply at the review level.

Response: The section has been revised to specify other duties and powers of the reviewing official, in addition to those already set out. For example, the official may seek additional evidence if necessary, including holding a new hearing and affording the parties an opportunity for written as well as oral argument (at the reviewing official's discretion). The reviewing official must give a copy of the written findings and decision to the parties. These duties and powers are regarded as necessary to insure that a full review will be conducted and that all parties will be informed of the result of the review. Revisions to timelines for any hearing or review are set out in section 121a.512.

CIVIL ACTION (§ 121a.511)

Comment: Commenters wanted the regulations revised to allow for direct appeal to the courts without first using administrative hearing and review procedures if those procedures would be futile, the timeliness or adequacy of the administrative proceedings are being challenged, or a class action is involved. Commenters cited language in the Congressional Record in support of this interpretation (121 Cong. Rec. S20433 daily ed., November 19, 1975).

Response: No change has been made. The Office of Education has decided not to regulate on this question. The issue of exhaustion of remedies will be up to the courts to resolve.

TIMELINESS AND CONVENIENCE OF HEARINGS AND REVIEW/S (§ 121a.512)

Comment: Commenters wanted clarification of the 45-day time limit for commencing and completing a hearing and review set out in the proposed regulations. They disagreed on whether the time should be shortened or lengthened.

Response: The section has been revised to set a 45-day time limit for a hearing and a 30-day limit for a State level review. In both instances, a decision must be reached and mailed to each of the parties within the time limits set. A hearing or reviewing officer may grant specific extensions, at his or her discretion, at the request of either party. The Office of Education believes reasonable outside time limits must be set to insure resolution of any dispute quickly so that the child's special education may proceed. Discretion for specific extensions is consistent with normal judicial and administrative practice.

CHILD'S STATUS DURING PROCEEDINGS (§ 121a.513)

Comment: Commenters suggested a provision be added to allow change of placement for health or safety reasons. One commenter requested that the regulations indicate that suspension not be considered a change in placement. Another commenter wanted more specificity to make it clear that where an initial placement is involved, the child be placed in the regular education program or if the parents agree, in an interim special placement.

Response: A comment has been added to make it clear that this section would not preclude a public agency from using its regular procedures for dealing with emergencies.

SURROGATE PARENTS (§ 121a.514)

Comment: Commenters requested that the regulations clarify when surrogates may

posed rules should be expanded or restricted. Among the additional rights sought were the right to compel the attendance of witnesses, prohibit the introduction of evidence not disclosed prior to the hearing, allow the child to be present and the hearing to be open to the public at the parents' discretion, and to specify whether the record of the hearing must be free or at reasonable cost.

Response: The section has been revised to add rights for any party to prohibit the introduction of evidence not previously disclosed to the other party and for the child to be present and the hearing to be open to the public. The purpose of hearings under this part is to ensure that handicapped children are provided free appropriate public education. Opening up the hearing and the evidence that may be presented should serve to insure that the result of a hearing will be in the best interests of the child. No provision has been added relating to cost. However, it is expected that a copy of any decision would be provided to the parent at no cost.

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Response: A comment has been added to make it clear that this section would not preclude a public agency from using its regular procedures for dealing with emergencies.

SURROGATE PARENTS (§ 121a.514)

Comment: Commenters requested that the regulations clarify when surrogates may

be appointed. One reason given was to insure that agencies do not attempt to appoint surrogates when parents are uncooperative or nonresponsive.

Response: The section has been revised to make it clear that the requirements for appointing surrogates apply only when no parent can be identified, the agency after reasonable efforts cannot discover the whereabouts of a parent, or the child is a ward of the State. Agencies are not allowed to appoint surrogates when parents are uncooperative or nonresponsive.

Comment: Commenters requested that the regulations further specify procedures to be used for the appointment of surrogates, including administrative proceedings with notice to interested parties and the right of interested parties to seek a review of the decision.

Response: No change has been made. State procedures for the appointment of surrogates will be followed. Disagreements about the choice of surrogates may be the subject of a due process hearing under section 121a.506.

Comment: A number of commenters suggested that the regulations provide more detail about the qualifications of the surrogates (for example, requiring training and a commitment to becoming acquainted with the child).

Response: No change has been made. The Office of Education believes these concerns are covered by section 121a.514(c)(2) which requires that the surrogate have knowledge and skills that insure adequate representation of the child.

Comment: A number of commenters were concerned about the legal liability of surrogates. Some commenters wanted the regulations to protect surrogates from any legal liability.

Response: No change has been made. The legal liability of surrogates will be determined under State law relating to such matters as breach of fiduciary duty, negligence, and conflict of interest. The Federal Government has no authority to limit legal liability.

Comment: A number of commenters sought clarification regarding which agency employees could serve as surrogates. For example, one commenter wanted the regulations to indicate whether the head of a State institution could serve as the surrogate.

Response: The regulation has been reworded to make it clear that no employee of any agency involved in the education or care of the child may serve as the surrogate parent.

PROTECTION IN EVALUATION PROCEDURES

Section 612(5)(C) of the Act requires States to establish non-discriminatory test-

ing procedures for use in the evaluation and placement of handicapped children. The requirements for public agencies to follow in carrying out this provision are set forth in sections 121a.530-121a.534 of Subpart E. (These section numbers have been changed to correspond with other number changes in Subpart E.)

The evaluation procedures in the proposed rules have been changed to conform to the corresponding requirements in the final regulations for section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84, §84.35) and in response to other comments received. (Many of the comments dealing with the language and substance of the proposed evaluation procedures are covered by the above conforming changes.) A summary of the changes in these procedures is included below:

(1) Proposed section 121a.431 ("Evaluation: change in placement") has been replaced with new section 121a.531 ("Preplacement evaluation"). This corresponds to section 84.35(a) of Part 84.

(2) Proposed section 121a.432 ("Evaluation procedures") has been divided into two sections (section 121a.532 "Evaluation procedures" and section 121a.533, "Placement procedures"). The new section on evaluation procedures (a) incorporates essentially verbatim the language of section 84.35(b) of Part 84, (b) adds two additional requirements from section 612(5)(C) of the Act which are not in Part 84 (e.g., the provision on native language, and the requirement that "No single procedure is used as the sole criterion for determining an appropriate educational program for a child"), and (c) requires that the evaluation be made by a "multidisciplinary team . . . including at least one teacher or other specialist with knowledge in the area of identified disability . . ."

(3) The new section on placement procedures incorporates essentially verbatim the language in section 84.35(c) of Part 84. In addition, the section ties the development of an individualized education program to the placement procedures.

The following additional comments were made regarding evaluation procedures:

Comment: Several commenters felt that the regulations should require State and local educational agencies to develop procedures for the conduct of evaluations. This would make it possible to determine the adequacy of the evaluations and to insure uniformity in basic procedures.

Response: A paragraph was added to section 121a.530 (General) which requires the State educational agency to insure that each public agency establishes and implements evaluation—placement procedures.

Comment: Several commenters felt that timeliness should be set for implementing

the evaluation process (e.g., for initial referral to evaluation and placement).

Response: No change has been made. The Office of Education has elected to impose very few absolute timelines in the regulations for this part, because of the potential administrative and legal problems they can cause. Imposing timelines can actually delay the provision of a service (for example, if the time periods are regarded as both minimum and maximum times for implementing a procedure).

A child should be evaluated as soon as possible following referral. Any undue delay in providing the evaluation would raise the question of the State and local educational agencies' compliance with sections 121a.128 and 121a.220 (identification and evaluation of all handicapped children).

Comment: Some commenters requested clarification regarding whether a reevaluation is needed, as required by proposed section 121a.431(a)(2), if the parents and agency agree that the child should be transferred from a special education program to a full time regular class placement.

Response: This specific section has been deleted in the final regulations. However, any changes in a child's placement (including a transfer to a regular class) would not be made until after a meeting is held to review the child's individualized education program in accordance with the requirements under sections 121a.340-121a.349 of Subpart C. If the parents and agency agree that the child no longer needs special education, a reevaluation would not be necessary. Section 121a.531 requires an evaluation before initial placement only. Reevaluations are covered under section 121a.534.

ADDITIONAL PROCEDURES FOR EVALUATING SPECIFIC LEARNING DISABILITIES

Sections 121a.540-121a.543 provide procedures for evaluating specific learning disabilities which supplement the basic evaluation requirements set out above ("PROTECTION IN EVALUATION PROCEDURES," §§ 121a.530-121a.534). These additional procedures were written to comply with section 5(b) of Pub. L. 94-142, which required the Commissioner to develop regulations that establish (1) criteria for determining whether a particular disorder or condition may be considered a specific learning disability, (2) diagnostic procedures for use in identifying SLD children, and (3) monitoring procedures for use in determining whether public agencies are complying with the criteria and diagnostic procedures.

The following major changes have been made from the proposed regulations published on November 29, 1976. (The reasons are set forth below in the discussion of specific comments.):

- (1) The formula has been deleted;

- (2) The "50 percent" figure for determining "severe discrepancy" has been deleted;

- (3) Provisions duplicating requirements in final regulations for general evaluation procedures and for medical examinations under Part B have been deleted.

- (4) The monitoring sections have been deleted, since State educational agency (SEA) monitoring responsibilities are covered under § 121a.601 of the Part B regulations. The Commissioner has established these detailed monitoring responsibilities of the SEAs and will monitor each State's compliance with these and other requirements of Part B.

The statute provides that when these final regulations take effect, the two percent cap on the number of children with specific learning disabilities who may be counted for allocation purposes is removed (section 5(c)). Therefore, § 121a.702(a)(2) of the Part B regulations, which repeated the statutory cap requirement, is deleted.

The following comments were made regarding the SLD proposed regulations:

USE OF FORMULA

Comment. Many commenters objected to the formula proposed for establishing a severe discrepancy between ability and achievement. Their concerns fell primarily into four areas:

- (1) The inappropriateness of attempting to reduce the behavior of children to numbers;

- (2) The psychometric and statistical inadequacy of the procedure;

- (3) The fear that use of the formula might easily lend itself to inappropriate use to the detriment of handicapped children;

- (4) The inappropriateness of using a single formula for children of all ages, particularly pre-school children.

Response. The formula has been deleted. Because of the above and other concerns, the Office of Education conducted a study to determine the effectiveness of the formula. While the findings showed that the formula has a certain degree of operational validity, they also identified pronounced technical limitations in its application, including all four concerns listed above.

Given the type and number of technical limitations, it has been determined that the formula should not be included in the final regulations.

Comment. A few commenters recommended alternative formulae for use in determining the existence of a severe discrepancy between ability and achievement.

Response. None of these formulae were adopted. Each was found to have the same types of technical limitations as the formula in the proposed rules.

USE OF OTHER APPROACHES

Comment. A few commenters suggested other approaches to defining specific learning disabilities. Among the suggestions for alternate approaches were those which:

(1) Require that a major discrepancy between verbal and performance scores on the WISC be established in order for a child to be considered as having a specific learning disability;

(2) Required that each area of information processing be subdivided into discrete functions and analyzed in terms of their effects on achievement. If the areas of discrepant functioning were determined to be critical to successful achievement, then a child could be considered as having a specific learning disability.

Response. Neither of these alternative approaches has been adopted. It was determined that the approaches could not be validated without engaging in extensive additional research.

COMPOSITION OF THE EVALUATION TEAMS

Comment. Many commenters had recommendations for requiring additional participants on the evaluation team. This was particularly true of speech and language pathologists who stated that a high percentage of children evaluated for specific learning disabilities have speech and language problems. A significant number of comments on the topic of the team composition were received from members of the field of reading as well.

Response. The general requirements for evaluation in § 121a.532 provide for appropriate selection of individuals to serve on the multi-disciplinary team. Therefore, no substantive change was made. For children with language and speech problems as part of, or associated with, specific learning disabilities, speech and language pathologists represent an appropriate professional resource.

Comment. Some commenters wanted the parents of the child in question to be part of the evaluation team.

Response. No change has been made. The comprehensive evaluation of children necessarily involves the collection of a variety of information, including information from the parents concerning their perceptions of the child's behavior. Such a practice is considered routine and basic to any evaluation and therefore unnecessary to be specifically listed. It might be emphasized that parents have the right under other sections of these Part B regulations to (1) participate in the development of the individual education program of their child; (2) request a due process hearing in the event they disagree with the findings of the evaluation team; (3) have access to all records pertaining to their

child, and (4) have other due process safeguards.

SLD CRITERIA AND PROCEDURES

Comment. A few commenters felt that Congressional mandate in section 5(b) of Pub. L. 94-142, which required the Commissioner to establish criteria and procedures for use in identifying specific learning disabilities, was not adequately met by the regulations.

Response. The Office of Education has satisfied the Congressional mandate in the following manner:

First, criteria have been developed for determining the existence of a specific learning disability (i.e., it must be established (a) that a severe discrepancy exists between ability and achievement; (b) that there is a severe achievement problem in one or more of seven areas relating to communication skills and mathematical abilities; and (c) that the discrepancy is not the result of other known handicapping conditions or of environmental, cultural, or economic disadvantages).

Second, comprehensive diagnostic procedures have been established, which are to be used in concert with the above criteria. These procedures include (a) the basic evaluation requirements in sections 121a.530-121a.534 which must be used in evaluating all handicapped children (including those suspected of having a specific learning disability), and (b) the additional procedures (set out in §§ 121a.540-121a.543) to be used in evaluating SLD children.

Third, with respect to monitoring procedures, these are already included throughout the Part B regulations. The Commissioner has established State educational agency monitoring procedures under § 121a.601, and will monitor each State's compliance with these and other requirements of Part B.

EXCLUSION CONDITIONS

Comment. Some commenters stated that children should not be excluded from consideration as having a specific learning disability if their severe academic discrepancy is primarily the result of: (1) a visual, hearing, or motor handicap; (2) mental retardation; (3) emotional disturbance; or (4) environmental, cultural, or economic disadvantage.

Response. No change has been made. These exclusions are statutory.

Comment. Commenters asked for definitions of visual handicaps, motor handicaps, and other "exclusion" terms.

Response. The term "visually handicapped" and other handicapping conditions are defined in § 121a.5. Motor handicap is considered as being included in the defini-

tion of orthopedically impaired. Other terms will be applied on a case-by-case basis by professional team members.

THEORY OF THE PROCEDURAL APPROACH

Comment. Commenters requested information on the theoretical basis for the approach taken.

Response. Those with specific learning disabilities may demonstrate their handicap through a variety of symptoms such as hyperactivity, distractibility, attention problems, concept association problems, etc. The end result of the effects of these symptoms is a severe discrepancy between achievement and ability. If there is no severe discrepancy between how much should have been learned and what has been learned, there would not be a disability in learning. However, other handicapping and sociological conditions may result in a discrepancy between ability and achievement. There are those for whom these conditions are the primary factors affecting achievement. In such cases, the severe discrepancy may be primarily the result of these factors and not of a severe learning problem. For the purpose of these regulations, when a severe discrepancy between ability and achievement exists which cannot be explained by the presence of other known factors that lead to such a discrepancy, the cause is believed to be a specific learning disability.

It was on this basic concept that these regulations were developed.

CERTIFICATION REQUIREMENTS

Comment. A few commenters questioned the need for certification by the team as to the existence of specific learning disabilities.

Response. No change has been made. By specifying the procedures to be used in determining the existence of a specific learning disability and because the team has all of the data on which to make an appropriate decision, heavy reliance was placed on the judgment of the evaluation team. Since the team has a great deal of latitude in making the determination of the existence of a specific learning disability, it was apparent that the team should document its decision and should clearly indicate the basis on which the determination was made.

SPECIFIC AREAS OF ACHIEVEMENT TO BE REVIEWED

Comment. A few commenters expressed concern that spelling not be listed as one of the eight areas of function which could be evaluated to establish a severe discrepancy between ability and achievement. It was stated that a severe discrepancy in spelling would not necessarily be indicative of a specific learning disability and that the compo-

nent factors of spelling could be included under one or more of the other seven factors. Some of those commenters stated that when spelling was one of the factors to be evaluated the requirement should be that a severe discrepancy in two or more areas would have to be indicated.

Response. Though "spelling" is listed in the statute, the components of spelling can be assumed under the other seven areas of function. Spelling as a category per se has been deleted from the final regulations.

MAINTENANCE OF 2 PERCENT CAP ON COUNT

Comment. Some commenters indicated that (1) since specific learning disabilities are difficult to define based on current knowledge and (2) because of the need for extensive research to be conducted before a universally accepted definition can be created, the requirement in the Act that limits the number of children eligible to be counted as learning disabled for the purpose of generating the Part B entitlement should be extended. The suggestion was that the cap on counting these children for allocation purposes would remain until such time as it was possible to differentiate all of the specific learning disabilities.

Response. Under the statute, the cap is removed upon the effective date of these regulations. It is generally agreed by parents and professionals alike that the isolation of various labels used by different theorists, as cited in the legislative history, are overlapping and represent assumptions about conditions which cannot with current technology be successfully determined or discretely categorized. Other categories of handicapping conditions as defined have no cap. Since there may in fact be more than two percent of the school age population in some States that are handicapped by specific learning disabilities, such a limitation is inequitable. Such a procedure would not help provide a basis for the determination of whether a child has a specific learning disability, and would not provide assistance in helping to resolve questions of appropriate diagnosis or placement in the event of due process hearings. For these reasons, it is better to adopt the regulations and lift the cap.

NEED FOR ADDITIONAL RESEARCH

Comment. Several commenters pointed out the need for additional research in the area of specific learning disabilities.

Response. As stated in the preamble to the proposed regulations, this need is almost universally acknowledged. The Bureau of Education for the Handicapped and other HEW agencies will continue to support research on the nature and treatment of specific learning disabilities.

MEDICAL EVALUATION

Comment: A few commenters expressed concern that medical examinations were not mandated for every child suspected of having a specific learning disability.

Response: Medical services that are necessary for diagnostic purposes are covered by the definition of related services in § 121a.13.

MORE DETAIL

Comment: Commenters asked for more detail on some of the requirements, for example, a more extensive description of length of observation and specific behaviors to be observed.

Response: No change has been made. The Office of Education believes the evaluation procedures are already very extensive and should prevent mislabeling.

LEAST RESTRICTIVE ENVIRONMENT

Section 612(5)(B) of the Act requires States to establish policies and procedures to insure that "to the maximum extent appropriate, handicapped children . . . are educated with nonhandicapped children . . ." The regulations for implementing this provision are set out in sections 121a.550-121a.556 of Subpart E.

A new paragraph was added to section 121a.550 which requires the State to insure that all public agencies establish and implement procedures in accordance with the requirements of this subpart. In addition, a new section, entitled "Nonacademic settings" was added. This section is taken from a new requirement in the section 504 regulations (45 CFR Part 84, § 84.34).

GENERAL (§ 121a.550)

Comment: A number of commenters requested that provisions be made for special support in the regular classroom in order to accommodate handicapped children (e.g., including reducing the pupil-teacher ratio and assigning aides to the room).

Response: No change was made, since the statute already authorizes the use of supplementary aids and services as a means of enabling a handicapped child to be educated with nonhandicapped children.

CONTINUUM OF ALTERNATIVE PLACEMENTS
(§ 121a.551)

Comment: Many commenters responded to this requirement. Some felt that terms other than "continuum" should be used (e.g., "range of programs" and "variety of services"). A large number of commenters felt that "continuum" carried negative connotations (e.g., statements were made that the concept undermines the ideals of Pub. L. 94-142, that it implies best-to-worst, etc.).

Other commenters felt that it discriminated against residential or private schools, and suggested that efforts be made to counteract this bias.

Response: No change has been made in this section. The term "continuum," as with "least restrictive environment" (LRE), is commonly used by agencies, advocates, and parents. However, there is nothing to prohibit an agency from using terms such as those included above in administering these provisions.

As with "LRE" the term that is used is not as important as the basic provision and how that provision is implemented. The purpose of a continuum is to be able to accommodate to differences between handicapped children in terms of the degree of special assistance they need to receive a free appropriate public education. This matter was dealt with directly in the June 26, 1975 Report of the House of Representatives on HR 7217 (H. Rept. No. 94-332, p.9):

The Committee understands the importance of providing educational services to each handicapped child according to his or her individual needs. These needs may entail instruction to be given in varying environments, i.e., hospital, home, school or institution. The Committee urges that where possible and where most beneficial to the child, special educational services be provided in a classroom situation. An optimal situation, of course, would be one in which the child is placed in a regular classroom. The Committee recognizes that this is not always the most beneficial place of instruction. No child should be denied an educational opportunity; therefore, H.R. 7217 expands special educational services to be provided in hospitals, in the home, and in institutions.

When it is clear that, because of the nature or severity of a child's handicap, the child must be educated in a setting other than the regular class, it is appropriate to implement such a placement. However, the LRE provision is also designed as a rights provision to protect against indiscriminate placement of a child in a separate facility solely because the child is handicapped and not because special education is needed in that type of setting.

Even with respect to severely handicapped children, it may be possible to meet the "regular education setting" goal by having a separate class or separate wing in a regular school building.

PLACEMENTS (§ 121a.552)

Comment: Many commenters were concerned that there may be an overzealous implementation of the LRE provision without regard to the needs of individual handicapped or nonhandicapped children.

Response: No substantive change has been made in this section, because the Office of Education feels that the section includes necessary safeguards to insure protection against the above concerns. With respect to those concerns, the overriding rule is that each child's placement must be determined annually and be based on his or her individualized education program.

With respect to concerns about the harmful effect of placing handicapped children in regular classes, the analysis of the section 504 regulations indicates: " * * * It should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs * * * " (45 CFR Part 84—Appendix, paragraph 24).

Comment: A commenter requested that a new provision be added which requires State and local educational agencies to utilize community-based early childhood development programs for 3-5 year old handicapped children. The main intent of the new provision is "aimed solely at assuring maximum appropriate mainstreaming."

Response: No change was made in the section. The existing provisions are considered to be adequate to cover the intent of this request.

CONFIDENTIALITY OF INFORMATION

NOTICE TO PARENTS (§ 121a.561)

Comment: Commenters asked that the detailed content of the notice requirements be deleted as excessive.

Response: No change has been made. The Office of Education believes the provisions require that States provide necessary information to inform parents about the type of information collected about handicapped children to meet the requirements of this part.

ACCESS RIGHTS (§ 121a.562)

Comment: Commenters requested that this section be expanded to require that access to records be given in no case less than five days prior to meetings to develop individualized education programs or any hearing and to permit authorized representatives of the parent to inspect the record. A commenter felt the 45-day outside time limitation could be misinterpreted to mean an agency need not comply at all after 45 days from the date of the request.

Response: Language has been added to make it clear that an agency must comply with a request for access before any meeting regarding an individualized education program. This will help insure that interested parents are able to familiarize themselves

with their child's records prior to any meeting and be able to participate more knowledgeably. The prohibition against unnecessary delay places an obligation on the agency to make the records available in a timely manner so that the Office of Education does not believe it is necessary to specify a specific time limitation. Section 121a.562 has been amended to give parents the right to have an authorized representative inspect their child's education records.

The 45-day time limitation is not subject to the misinterpretation the commenter fears. This language is from the Family Educational Rights and Privacy Act, section 438 of the General Education Provisions Act (specifically section 432(a)(1)(A)), to which these regulations are tied (by statute).

FEES (§ 121a.566)

Comment: A commenter felt the first copy of a record should be given free upon request from the parents.

Response: No change has been made. The prohibition against charging a fee if it would effectively prevent the parents from inspecting and reviewing the record is based on a requirement in the Family Educational Rights and Privacy Act, to which these regulations are limited by statute (section 612 (2)(C)). Agencies may of course adopt policies of making copies available free of charge and are encouraged to do so.

HEARING PROCEDURES (§ 121a.570)

Comment: A commenter requested clarification of who conducts a hearing.

Response: The section states that the procedures under § 99.22 (the hearing procedures in the regulations for the Family Educational Rights and Privacy Act) be used. Section 99.22(b) states the hearing may be conducted by any party, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.

CONSENT (§ 121a.571)

Comment: Commenters requested that "advanced students," "persons acting as practicum advisors," and researchers be given access to records without consent.

Response: No change has been made. The Family Educational Rights and Privacy Act specifically lists parties and conditions where records may be released without parental consent.

SAFEGUARDS (§ 121a.572)

Comment: A commenter requested a list of positions rather than a list of names of employees who may have access to personally identifiable information.

Response: The requirement has been modified to require a list of names and posi-

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tions to more fully inform parents and the public of the categories of individuals given access to data as well as the specific individuals who may have access.

DESTRUCTION OF INFORMATION (§ 121a.573)

Comment: A number of commenters were concerned about the destruction requirements. The principle concern was that detailed records might be needed by the handicapped individuals to show proof of need for further services from other agencies. One recommendation was that the parent and child be notified of the existence of the records at the time of graduation and informed that they would be destroyed only upon request of the parent or child. Another commenter suggested that records be maintained, but that parents be given the option to have them destroyed.

Response: The requirement has been revised to permit the parents to request that the information be destroyed and to require the public agency to inform the parents of the destruction option and their right to have the records destroyed upon request. The notice would normally be given at the time a child graduates or otherwise leaves the agency. The purpose of the destruction option is to insure that nonessential records about a child's behavior, performance, and abilities, which may possibly be stigmatizing and are highly personal, are not kept after they are no longer needed for educational purposes. Destruction of these records is the best protection against improper or unauthorized disclosures. However, the handicapped child or his or her parents may need certain records for other purposes (such as proof of eligibility for benefits).

Comment: Commenters asked that notice be given to a child who has reached the age of majority.

Response: No change has been made. Section 121a.574 requires the State educational agency to have policies and procedures regarding children's privacy rights. Where education records are maintained by an agency covered under the Family Educational Rights and Privacy Act, these rights must include transfer of the rights of parents to the child when he or she reaches 18 or the postsecondary education level.

Other Changes: The regulations have been revised to make it clear that the records covered under this Act are the same as the type of records covered under the Family Educational Rights and Privacy Act. Consistency in coverage is necessary to avoid undue administrative burdens on public agencies covered by both laws.

OFFICE OF EDUCATION PROCEDURES

General: The requirements in these sections largely repeated the statute. Perhaps

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for this reason, few comments were received on the Office of Education procedures.

WAIVER OF REQUIREMENT REGARDING SUPPLEMENTING AND SUPPLANTING WITH PART B FUNDS (§ 121a.589)

Comment: A commenter requested that the special study to determine if a waiver of the requirement should be granted include a review of whether grievance procedures are operational. Other commenters disagreed on the need for this study.

Response: A requirement has been added to have the study cover the adequacy of the State's due process procedures, as this is an important part of insuring that grievances are heard and to determine if parents and other parties are satisfied with the adequacy of the State's programs for handicapped children.

WITHHOLDING PAYMENTS (§ 121a.590)

Comment: Commenters asked for definitions of "substantial compliance" and "failure to comply." Commenters also urged that the Office of Education, the Office for Civil Rights, and Departmental audit officials apply the same criteria.

Response: No change has been made. The Office of Education believes these terms will have to be defined on a case-by-case basis.

The Office of Education and the Office for Civil Rights will coordinate and cooperate in enforcing requirements under this Part and Part 84 (the regulations for section 504 of the Rehabilitation Act of 1973) where identical requirements are involved. The Office of Education will make every effort to insure that auditing officials understand and apply any criteria used by program officials.

SUBPART F—STATE ADMINISTRATION

This subpart has been expanded with requirements set out under the major headings: State Educational Agency Responsibilities, Use of Funds, and State Advisory Panel.

STATE EDUCATIONAL AGENCY RESPONSIBILITIES

Provisions on State educational agency responsibilities have been redrafted (and relocated from proposed section 121a.34) in response to comments, to better summarize general administrative and supervisory responsibilities in section 612(6) and other sections of the Act. A section on complaint procedures, which was included in previous regulations for Part B (prior section 121a.14) and inadvertently not included in the proposed regulations has been added.

Comment: Commenters requested addition of a new section on State educational

agencies' responsibilities for monitoring, evaluation, and enforcement activities to insure compliance throughout the State with the requirements of this part. The commenters made specific suggestions for implementing such a section, including collection of data, conduct of on-site visits, audit of fund utilization, comparison of written individualized education programs with programs actually provided, meetings with parents and parent groups, public hearings, development of detailed criteria for evaluating program quality and effectiveness, and detailed procedures for enforcing requirements against noncomplying agencies.

Response: A new section has been added to require each State educational agency to develop procedures and specific timelines for monitoring and evaluating public agencies involved in the education of handicapped children. These are minimal requirements. Adoption of the other suggestions made by the commenters is encouraged but not required.

ALLOWABLE COSTS (§ 121A.621)

Comment: A number of commenters requested that the limitation on State administrative funds be raised and that provisions be added to allow local educational agencies to use funds for administrative costs.

Response: No change has been made on the State limit as it is a statutory limitation.

Comment: Commenters requested that the regulations require each State educational agency to use its funds for specific purposes. One recommendation was that ten percent of the administrative funds be used to train persons in local communities to assist and represent parents and to prepare and disseminate to parents information about their rights under these regulations. Another was that they be used to disseminate instructional material.

Response: No change has been made. The Office of Education does not believe it is appropriate to dictate to States how to use their limited administrative funds.

STATE ADVISORY PANEL

ESTABLISHMENT (§ 121A.650)

Comment: One commenter recommended that local panels be required.

Response: No change has been made. The statute only requires a State advisory panel. A State may, of course, decide to establish local panels.

MEMBERSHIP (§ 121A.651)

Comment: A substantial number of commenters requested additions to the list of representatives to be included on the panel, including professional groups, legal advoca-

cy groups, and employees of State and local agencies. Some commenters recommended that handicapped individuals or their parents make up specific percentages of the panel.

Response: A provision has been added to make it clear that a State may expand the advisory panel to include additional persons in the groups listed (which are statutory) and representatives of the other groups. The Office of Education does not believe it is appropriate to prescribe specific percentages, as the States should have some discretion to determine the proper mix of representatives. A comment has been added to indicate factors a State may consider in determining balanced membership of the panel.

ADVISORY FUNCTIONS AND ADVISORY PANEL PROCEDURES (§§ 121A.652-121A.653)

Comment: Commenters recommended that the regulations indicate that the panel must comment publicly on the State annual program plan as well as on any rules and regulations regarding education of handicapped children, review annual evaluations, and act as ombudspersons to hear complaints.

Response: A change has been made to require the panel to comment on the annual program plan. The annual program plan is an extremely important document and this addition makes it clear that the advisory panel must be involved in reviewing it. The other recommendations are legitimate activities but not ones the Federal government believes should be required by these regulations at this time.

Comment: Commenters requested that the regulations provide that panel members be reimbursed for reasonable and necessary expenses for attending meetings and performing duties.

Response: This change has been made. It is reasonable to require reimbursement for expenses so that persons will be able to participate without financial sacrifice.

SUBPART G—ALLOCATIONS OF FUNDS; REPORTS

ALLOCATIONS

This major section of Subpart G is entirely statutory; therefore, there are no comments of substance on which to respond.

REPORTS—ANNUAL REPORT OF CHILDREN SERVED (§§ 121A.750-121A.754)

The following comments were received regarding the annual report by the States of the number of children receiving special education and related services. This report is the basis for each State's allocation of funds under Part B, and serves as a mechanism for the Commissioner to meet some of his reporting requirements to Congress

under section 618 of the Act. Some commenters recommended changes that would require amendment of the Act. These have not been summarized except where further explanation seemed to be useful.

AMOUNT OF INFORMATION REQUIRED IN THE REPORT

Comment: Commenters varied in their views on what information should be included in the report. It was suggested that additional information be collected for compliance purposes. Objections were made to the requirement for reporting information by disability category, and for reporting the 0-2 year old population. On the other hand, some commenters recommended that additional categories be added to the report, particularly for deaf-blind children and for multihandicapped children.

Response: Two categories of handicapped children have been added to the report—one for multihandicapped children and one for deaf-blind children. These terms are defined in section 121a.5 of Subpart A. No other changes have been made on the amount of information to be reported.

The additional categories should help to insure that no handicapped child is counted more than once; since the States will not have to decide in which of two or more disability categories to count a multihandicapped child. The changes conform to existing reporting requirements used by the States.

The annual report of children served is not a compliance document. It is only used to determine each State's allocation and to assist the Commissioner in meeting his reporting requirements to the Congress under section 618. Under section 611 of the Act, allocations are based on the number of handicapped children in each State receiving special education and related services. Compliance with requirements such as "least restrictive environment" will be achieved through other mechanisms, including the State's annual program plan, the local educational agency's application, and monitoring by the State educational agency and the Office of Education.

As explained in the preamble to the proposed rules published in the FEDERAL REGISTER on September 8, 1976, the report requirements are the minimum needed by the Commissioner to carry out the Act. (See 41 FR 37814.) While the Commissioner is concerned about the possible harmful effects of "labeling" children, the Act requires that the Commissioner report a substantial amount of information to Congress by disability category. For this reason, and for the other reasons stated in the September 8, 1976, FEDERAL REGISTER, there appears to be no workable alternative to retraining the categories in the States' annual reports. The

various disability categories, as well as the requirements to use them in the Commissioner's reports to the Congress, are statutory.

WHO MAY BE COUNTED

Comment: Commenters disagreed as to whether handicapped children should be counted if their special education is paid for solely from private sources or solely from Federal funds (such as children living on military bases). Some thought that only publicly-funded special education should qualify, while others argue that since all children have a right to a free appropriate public education the source of funding (other than the parent) should not matter.

Response: Section 121a.753 has been amended to provide that handicapped children (including such children in Head Start or other preschool programs) may be counted only if they (1) are enrolled in a school or program which is operated or supported by a public agency, and (2) receive special education that meets State standards.

A State may not count a child whose special education is paid solely by the Federal government, unless the child is in one of the age groups 3-5 or 18-21, and there are no local or State funds available for nonhandicapped children in that age group.

Children funded solely by Federal government would include Indian children whose special education is paid for solely by the Federal government, as well as children on military bases whose education is paid for solely with Federal funds. This rule is consistent with the requirement that a free appropriate public education (FAPE) be made available by the State to each handicapped child. Parents are not required to take advantage of FAPE. If they choose to educate their child outside of the public school system, even though FAPE is available, the State has discharged its responsibility. However, by the same token, the child should not be counted by the state for its allocation if the child is not being provided special education at public expense. The same reasoning applies to Indian children and other children who receive their special education from the Federal government. The rule should serve as an encouragement to States to provide services to all handicapped children, however, since any child provided special education from State or local funds may be counted.

Comment: Two other provisions in the regulations were objected to by commenters. The first of these provided that handicapped children "enrolled" in schools to receive special education could be counted as receiving special education. These commenters felt that enrollment did not guarantee actual receipt of services. The second provision stated, in essence, that a

under section 618 of the Act. Some commenters recommended changes that would require amendment of the Act. These have not been summarized except where further explanation seemed to be useful.

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Response: Two categories of handicapped children have been added to the report—one for multihandicapped children and one for deaf-blind children. These terms are defined in section 121a.5 of Subpart A. No other changes have been made on the amount of information to be reported.

The additional categories should help to insure that no handicapped child is counted more than once, since the States will not have to decide in which of two or more disability categories to count a multihandicapped child. The changes conform to existing reporting requirements used by the States.

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Response: Section 121a.753 has been amended to provide that handicapped children (including such children in Head Start or other preschool programs) may be counted only if they (1) are enrolled in a school or program which is operated or supported by a public agency, and (2) receive special education that meets State standards.

A State may not count a child whose special education is paid solely by the Federal government, unless the child is in one of the age groups 3-5 or 18-21, and there are no local or State funds available for nonhandicapped children in that age group.

Children funded solely by Federal government would include Indian children whose special education is paid for solely by the Federal government, as well as children on military bases whose education is paid for solely with Federal funds. This rule is consistent with the requirement that a free appropriate public education (FAPE) be made available by the State to each handicapped child. Parents are not required to take advantage of FAPE. If they choose to educate their child outside of the public school system, even though FAPE is available, the State has discharged its responsibility. However, by the same token, the child should not be counted by the state for its allocation if the child is not being provided special education at public expense. The same reasoning applies to Indian children and other children who receive their special education from the Federal government. The rule should serve as an encouragement to States to provide services to all handicapped children, however, since any child provided special education from State or local funds may be counted.

Comment: Two other provisions in the regulations were objected to by commenters. The first of these provided that handicapped children "enrolled" in schools to receive special education could be counted as receiving special education. These commenters felt that enrollment did not guarantee actual receipt of services. The second provision stated, in essence, that a

child who receives special education may be counted, but not a child who receives only "related services." This was viewed as an overly restrictive reading of the Act.

Response: No change has been made in the regulations. While no system is perfect, enrollment is a legitimate way of determining the number of handicapped children receiving special education on October 1 and on February 1, the two dates on which the Act requires the count of children served. It would not be practical to make an actual head count of children in classrooms and other facilities where services are provided.

With respect to children who only receive "related services," this is governed by statutory language. "Related services" are only those "required to assist a handicapped child to benefit from special education." (Section 602(17) of the Act.) If a child does not need special education, there can be no "related services," as that term is defined in the Act. However, section 121a.14 permits a State to define certain services as "special education," if those services are "specially designed instruction to meet the unique needs of a handicapped child." (This is taken from the definition of "special education" in section 602(16) of the Act.)

REALLOCATION OF LOCAL EDUCATIONAL AGENCY FUNDS (§ 121a.706)

Comment: Commenters requested criteria be added for when funds may be reallocated.

Response: No criteria have been added as determinations will be made on a case-by-case basis.

[42 FR 42476, Aug. 23, 1977, as amended at 42 FR 65084, Dec. 29, 1977]

APPENDIX B—INDEX TO PART 121a

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Definitions:
First priority children—§ 121a.320(a).
Second priority children—§ 121a.320(b).
General requirements—§§ 121a.320-121a.324.
Local application requirement—§ 121a.225.
State direct and support services—
§ 121a.370.

PRIVATE SCHOOL CHILDREN

Annual program plan requirement—
§ 121a.140.
Confidentiality of information—§ 121a.560.
Cost of residential placement—§ 121a.302.
Handicapped children placed or referred by
public agencies—§§ 121a.400-121a.403.
Handicapped children not placed or referred
by public agencies—§§ 121a.450-121a.460.
Individualized education program—
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Least restrictive environment—§ 121a.554.
Part B applicability to private schools—
§ 121a.2.
Physical education—§ 121a.307.

PROCEDURAL SAFEGUARDS

See: Complaints.
Consent.
Hearings.
Notice.
Surrogate Parents.
Annual program plan requirements—
§§ 121a.131; 121a.136.
Local application requirement—§ 121a.237.

PUBLIC PARTICIPATION

See: Hearings.
Annual program plan requirements—
§§ 121a.120; 121a.137; 121a.280-121a.284.
Local application requirements—§§ 121a.226;
121a.234.
Secretary of Interior application—
§ 121a.261.
State advisory panel—§§ 121a.650-121a.654.

RECORDS

See: Confidentiality of Information.
Annual program plan requirement—
§ 121a.143.
Comparable services—§ 121a.231.
Count of children served—§ 121a.754.
Excess costs—§ 121a.183.
Individualized education programs—
§ 121a.130.
Local application requirement—§ 121a.233.
Parents may examine—§§ 121a.502; 121a.562.
Parents not participating in meetings—
§ 121a.345.

RELATED SERVICES

See: Free Appropriate Public Education.
Individualized Education Program
Defined—§ 121a.13.

REPORTS

Annual report of children served—
§§ 121a.750-121a.754.
Local application requirements—§§ 121a.232;
121a.233.
State advisory panel—§ 121a.652.

SPECIAL EDUCATION

See: Free Appropriate Public Education.
Individualized Education Program.
Defined—§ 121a.14.

STATE ADVISORY PANEL

Annual program plan requirement—
§ 121a.147.
General requirements—§§ 121a.650-121a.653.

STATE DIRECT AND SUPPORT SERVICES

Annual program plan requirement—
§ 121a.51.
General requirements—§§ 121a.360-121a.372.

SUPPLANTING

Applicability to State educational agency—
§ 121a.372.
Local application requirement—§ 121a.230.
Private schools—§ 121a.460.
Waiver of requirement—§ 121a.589.

SURROGATE PARENTS

Definition of parent—§ 121a.10.
Duty of public agency to assign—§ 121a.514.
Responsibilities—§ 121a.514.
Selection—§ 121a.514.

TESTING

See: Evaluation.

TIME LIMITS AND TIMETABLES

Annual program plan effective period—
§ 121a.114.
Evaluation of educational programs—
§ 121a.146.
Free appropriate public education—
§§ 121a.122; 121a.300.
Full educational opportunity goal—
§§ 121a.125; 121a.222.
Hearing decisions—§§ 121a.512; 121a.583.
Individualized education programs—
§§ 121a.342; 121a.343.
Public participation in the annual program
plan—§ 121a.280-121a.284.
Reevaluation—§ 121a.534.
Report of children served—§ 121a.750
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§ 121a.601.
State review of hearing decision—§ 121a.512.

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- Entitlements—§§ 121a.700-121a.710.
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- Department of the Interior (Indian children)—§ 121a.262.
- Excess costs—§§ 121a.182-121a.186.
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PART 121b—REGIONAL RESOURCE CENTERS

Subpart A—General

Sec.

- 121b.1 Scope.
- 121b.2 Purpose.
- 121b.3 Definition.
- 121b.4 Eligible parties.

Subpart B—Services and Activities

- 121b.10 Need and capability
- 121b.11 Services.
- 121b.12 Location of centers.
- 121b.13 Evaluation and dissemination.
- 121b.14 Coordinating office for regional resource centers.
- 121b.15 Parental participation.
- 121b.16 Auxiliary activities.

AUTHORITY Sec. 621, Pub. L. 91-230, 84 Stat. 181 (20 U.S.C. 1421), unless otherwise noted.

SOURCE 40 FR 7413, Feb. 20, 1975, unless otherwise noted

Subpart A—General

§ 121b.1 Scope.

(a) This part applies to projects assisted under section 621 of the Act.

(b) Assistance provided under this part is subject to applicable provisions contained in Subchapter A of this chapter (relating to fiscal, administrative, property management, and other matters) and Part 121 of this chapter.

(20 U.S.C. 1421)

§ 121b.2 Purpose.

Payment of Federal funds under this part may be made to assist eligible parties in the establishment and operation of regional centers which will develop and apply the best methods of appraising the special educational needs of handicapped children referred to them and will provide other services to assist in meeting such needs.

(20 U.S.C. 1421(a))

§ 121b.3 Definition.

As used in this part: "Educational program" means a curriculum prescribed for a handicapped child, designed to meet the needs of that child as determined through testing and other methods of educational evaluation. The term includes:

(a) Long-range plans which generalize the sequence and content of educational experiences a child should have, over a period of years, through various schools, clinics, tutorial programs, and/or other kinds of broad units of teaching/learning situations;

(b) Short-range plans which generalize the sequence and content of educational experiences a child should have for the next few months, school year, or several years; and

(c) Plans for the immediate future which detail specific sets of teaching strategies, prescribed skill-building activities, or other specific curricular activities a child should have for the next few days, weeks, or month.

(20 U.S.C. 1421)

TECHNICAL AMENDMENTS TO P.L. 94-142 REGULATIONS,

46 FEDERAL REGISTER 3865 (January 16, 1981)

DEPARTMENT OF EDUCATION

34 CFR Part 300

Assistance to States for Education of Handicapped Children

AGENCY: Department of Education.

ACTION: Technical amendment; Final rule.

SUMMARY: The Secretary issues this regulation to make changes in the definition of "handicapped children" under Part B of the Education of the Handicapped Act, as amended.

(1) The reference to "autistic" children is deleted from the disability category "seriously emotionally disturbed" under the definition of "handicapped children"; and

(2) A reference to "autistic" children is added under the disability category "other health impaired" under the definition of "handicapped children".

EFFECTIVE DATE: These regulations are expected to take effect 45 days after they are transmitted to Congress. They are transmitted to Congress several days before they are published in the Federal Register. The effective date is changed by statute if Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT: Mrs. Beverly E. Brightly, U.S. Department of Education, Office of Special Education and Rehabilitative Services, Division of Assistance to States, 400 Maryland Avenue, S.W. (Room 4932, Donohoe Building), Washington, D.C. 20202, Telephone: (202) 472-7921.

SUPPLEMENTARY INFORMATION: The proposed rules which included the definition of "handicapped children" for the purposes of Part B of the Education of the Handicapped Act, as amended by Pub. L. 94-142, were published December 30, 1976 (41 FR 58968). The final regulations were published August 23, 1977 (42 FR 42474).

Congress did not address autism in developing the statute. When the implementing regulations were published in 1977, autism was placed under the category of "seriously emotionally disturbed", based upon knowledge available to the agency at that time. We now conclude that this original classification of autistic children is inappropriate because not all autistic children are seriously emotionally disturbed. The technical amendment to the regulations reflects our expanded knowledge of autism

gained through our contracts with and knowledge provided by the National Society for Autistic Children (NSAC), the National Institute for Neurological and Communicative Disorders and Stroke (NINCDS), and others who have sought to bring to our attention current thinking in the field of autism. The Secretary does not expect this change to affect the number of handicapped children identified as autistic, but only the manner or category in which autistic children will be reported.

Since this amendment does not represent a substantive change in the regulations, the Secretary has determined, in accordance with 5 U.S.C. 553, that public participation in the rulemaking process is unnecessary.

Dated: January 11, 1981.

Shirley M. Hufstetler,
Secretary of Education.

(Catalog of Federal Domestic Assistance Number 84.027: Education of Handicapped Children, Part B)

(The Education of the Handicapped Act, as amended (20 U.S.C. 1401 *et seq.*))

The Secretary amends Part 300 of Title 34 of the Code of Federal Regulations by revising § 300.5(b)(7) and (b)(8)(ii) to read as follows:

§ 300.5 Handicapped children.

(b) . . .

(7) "Other health impaired" means (i) having an autistic condition which is manifested by severe communication and other developmental and educational problems; or (ii) having limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, which adversely affects a child's educational performance.

(8) "Seriously emotionally disturbed" is defined as follows:

.

(ii) The term includes children who are schizophrenic. The term does not include children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.

(FR Doc. 81-1587 Filed 1-15-81; 2:43 am)
BILLING CODE 4000-01-M

SECTION §504 OF THE REHABILITATION ACT OF 1973

29 U.S.C. § 794

GENERAL PROVISIONS

§ 701. Congressional declaration of purpose

The purpose of this chapter is to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living.

As amended Pub.L. 95-602; Title I, § 122(a)(1), Nov. 6, 1978, 92 Stat. 2984.

§ 704. Nondiscrimination under federal grants and programs; promulgation of rules and regulations

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

As amended Pub.L. 95-602, Title I, §§ 119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987.

§ 704a. Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Pub.L. 93-112, Title V, § 505, as added Pub.L. 95-602, Title I, § 120, Nov. 6, 1978, 92 Stat. 2982.

References in Text. Sections 717 and 706(f) through 706(k) of the Civil Rights Act of 1964, referred to in subsec. (a)(1), are classified to sections 2000e-18 and 2000e-5(f) through (k) of Title 42, The Public Health and Welfare, respectively. Title VI of the Civil Rights Act of 1964, referred to in subsec. (a)(2), is classified to section 2000d et seq. of Title 42, The Public Health and Welfare.

Legislative History. For legislative history and purpose of Pub.L. 95-602, see 1978 U.S. Code Cong. and Adm. News, p. 7312.

FINAL REGULATIONS UNDER §504 OF THE REHABILITATION ACT

45 C.F.R. Part 84^{*}

and

45 C.F.R. Parts 80 and 81^{*}

*With the organization of the new U.S. Department of Education, All regulations concerning education have been recodified. These regulations now appear at 34 C.F.R. Parts 104 (formerly part 84) and 100 and 101 (formerly parts 80 and 81, respectively). See 45 FEDERAL REGISTER 77368 (November 21, 1980).

PART 84—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

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APPENDIX A—ANALYSIS OF FINAL REGULATION

APPENDIX B—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

AUTHORITY: Sec. 504, Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794), sec. 111(a), Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1619 (29 U.S.C. 706); sec. 606, Education of the Handicapped Act (20 U.S.C. 1405), as amended by Pub. L. 94-142, 89 Stat. 795; sec. 321, Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, 84 Stat. 182 (42 U.S.C. 4581), as amended; sec. 407, Drug Abuse Office and Treatment Act of 1972, 86 Stat. 78 (21 U.S.C. 1174), as amended

SOURCE: 42 FR 22677, May 4, 1977, unless otherwise noted.

Subpart A—General Provisions

§ 84.1 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

§ 84.2 Application.

This part applies to each recipient of Federal financial assistance from the Department of Health, Education, and Welfare and to each program or activity that receives or benefits from such assistance.

§ 84.3 Definitions.

As used in this part, the term:

(a) "The Act" means the Rehabilitation Act of 1973, Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 29 U.S.C. 794.

(b) "Section 504" means section 504 of the Act.

(c) "Education of the Handicapped Act" means that statute as amended by the Education for all Handicapped Children Act of 1975, Pub. L. 94-142, 20 U.S.C. 1401 et seq.

(d) Department means the Department of Health, Education, and Welfare.

(e) Director means the Director of the Office for Civil Rights of the Department.

(f) Recipient means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(g) Applicant for assistance means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.

(h) Federal financial assistance means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of

(1) Funds.

(2) Services of Federal personnel, or

(3) Real and personal property or any interest in or use of such property, including

(i) Transfers or leases of such property for less than fair market value or for reduced consideration, and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(i) Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(j) Handicapped person means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the phrase

(i) Physical or mental impairment means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) Major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) Has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) Is regarded as having an impairment means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment, or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

(k) Qualified handicapped person means

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to public preschool, elementary, secondary, or adult educational services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under § 612 of the Education of the Handicapped Act, and

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(l) Handicap means any condition or characteristic that renders a person a handicapped person as defined in paragraph (j) of this section.

§ 84.4 Discrimination prohibited.

(a) General. No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.

(b) Discriminatory actions prohibited. (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap.

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others.

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others.

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others.

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, bene-

fit, or service to beneficiaries of the recipients program.

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such programs or activities that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accom-

plishment of the objectives of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving or benefiting from Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(c) *Programs limited by Federal law.* The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

§ 84.5 Assurances required

(a) *Assurances.* An applicant for Federal financial assistance for a program or activity to which this part applies shall submit an assurance, on a form specified by the Director, that the program will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Covenants.* (1) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the instrument effecting or recording this transfer shall contain a covenant running with the land to assure non-discrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (b)(2) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Director may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as he or she deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

§ 84.6 Remedial action, voluntary action, and self-evaluation.

(a) *Remedial action.* (1) If the Director finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this part, the recipient shall take such remedial action as the Director deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of section 504 or this part and where an

other recipient exercises control over the recipient that has discriminated, the Director, where appropriate, may require either or both recipients to take remedial action.

(3) The Director may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action (i) with respect to handicapped persons who are no longer participants in the recipient's program but who were participants in the program when such discrimination occurred or (ii) with respect to handicapped persons who would have been participants in the program had the discrimination not occurred.

(b) *Voluntary action.* A recipient may take steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) *Self-evaluation.* (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;

(ii) Modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirements of this part; and

(iii) Take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

(2) A recipient that employs fifteen or more persons shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Director upon request (i) a list of the interested persons consulted (ii) a description of areas examined and any problems

identified, and (iii) a description of any modifications made and of any remedial steps taken.

§ 84.7 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part.

(b) *Adoption of grievance procedures.* A recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to postsecondary educational institutions.

§ 84.8 Notice.

(a) A recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504 and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its programs and activities. The notification shall also include an identification of the responsible employee designated pursuant to § 84.7(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publication, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications

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containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

§ 84.9 Administrative requirements for small recipients.

The Director may require any recipient with fewer than fifteen employees, or any class of such recipients, to comply with §§ 84.7 and 84.8, in whole or in part, when the Director finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

§ 84.10 Effect of state or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

Subpart B—Employment Practices

§ 84.11 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies.

(2) A recipient that receives assistance under the Education of the Handicapped Act shall take positive

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steps to employ and advance in employment qualified handicapped persons in programs assisted under that Act.

(3) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(4) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this subparagraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeship programs.

(b) *Specific activities.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation.

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training.

(8) Employer sponsored activities, including social or recreational programs, and

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(9) Any other term, condition, or privilege of employment.

(c) A recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

§ 84.12 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include: (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:

(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

§ 84.13 Employment criteria.

(a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) the test score or other selection criterion, as used by the recipient, is shown to be job-related for the

position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.

(b) A recipient shall select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

§ 84.14 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct a preemployment medical examination or may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.

(b) When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 84.6 (a), when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 84.6(b), or when a recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped. *Provided, That:*

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept

confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty. *Provided*, That (1) All entering employees are subjected to such an examination regardless of handicap, and (2) the results of such an examination are used only in accordance with the requirements of this part.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

(1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations;

(2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and

(3) Government officials investigating compliance with the Act shall be provided relevant information upon request.

§§ 84.15-84.20 [Reserved]

Subpart C—Program Accessibility

§ 84.21 Discrimination prohibited.

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

§ 84.22 Existing facilities.

(a) *Program accessibility* A recipient shall operate each program or activity to which this part applies so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons. This

paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) *Methods* A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of § 84.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate.

(c) *Small health, welfare, or other social service providers.* If a recipient with fewer than fifteen employees that provides health, welfare, or other social services finds, after consultation with a handicapped person seeking its services, that there is no method of complying with paragraph (a) of this section other than making a significant alteration in its existing facilities, the recipient may, as an alternative, refer the handicapped person to other providers of those services that are accessible.

(d) *Time period* A recipient shall comply with the requirement of paragraph (a) of this section within sixty days of the effective date of this part except that where structural changes in facilities are necessary, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(e) *Transition plan* In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within six

months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve full program accessibility and, if the time period of the transition plan is longer than one year, identify the steps of that will be taken during each year of the transition period; and

(4) Indicate the person responsible for implementation of the plan.

(f) *Notice.* The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by handicapped persons.

§ 84.23 New construction.

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this part.

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

(c) *American National Standards Institute accessibility standards.* Design, construction, or alteration of facilities in conformance with the "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped," published by the American National Standards Institute, Inc. (ANSI A117.1-1961 (R1971)),¹ which is incorporated by reference in this part, shall constitute compliance with paragraphs (a) and (b) of this section. Departures from particular requirements of those standards by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

§§ 84.24-84.30 [Reserved]

Subpart D—Preschool, Elementary, and Secondary Education

§ 84.31 Application of this subpart.

Subpart D applies to preschool, elementary, secondary, and adult education programs and activities that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 84.32 Location and notification.

A recipient that operates a public elementary or secondary education program shall annually:

(a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and

(b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.

§ 84.33 Free appropriate public education.

(a) *General.* A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each

¹ Copies obtainable from American National Standards Institute, Inc., 1430 Broadway, New York, N.Y. 10018

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qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 84.34, 84.35, and 84.36.

(2) Implementation of an individualized education program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

(3) A recipient may place a handicapped person in or refer such person to a program other than the one that it operates as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

(c) *Free education*—(1) *General.* For the purpose of this section, the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the program. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

(2) *Transportation.* If a recipient places a handicapped person in or refers such person to a program not

operated by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the program is provided at no greater cost than would be incurred by the person or his or her parents or guardian if the person were placed in the program operated by the recipient.

(3) *Residential placement.* If placement in a public or private residential program is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the program, including non-medical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.

(4) *Placement of handicapped persons by parents.* If a recipient has made available, in conformance with the requirements of this section and § 84.34, a free appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made such a program available or otherwise regarding the question of financial responsibility are subject to the due process procedures of § 84.36.

(d) *Compliance.* A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part. A recipient that is not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section shall meet such requirements at the earliest practicable time and in no event later than September 1, 1978.

§ 84.31 Educational setting

(a) *Academic setting.* A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the reg-

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ular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

(b) *Nonacademic settings.* In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 84.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

(c) *Comparable facilities.* If a recipient, in compliance with paragraph (a) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

§ 84.35 Evaluation and placement.

(a) *Preplacement evaluation.* A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.

(b) *Evaluation procedures.* A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that

(1) Tests and other evaluation materials have been validated for the spe-

cific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer.

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(c) *Placement procedures.* In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformance with § 84.34.

(d) *Reevaluation.* A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education of the Handicapped Act is one means of meeting this requirement.

§ 84.36 Procedural safeguards.

A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regard-

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ing the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

§ 84.37 Nonacademic services.

(a) *General.* (1) A recipient to which this subpart applies shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

(b) *Counseling services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities.

(c) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs, and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that

offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of § 84.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

§ 84.38 Preschool and adult education programs.

A recipient to which this subpart applies that operates a preschool education or day care program or activity or an adult education program or activity may not, on the basis of handicap, exclude qualified handicapped persons from the program or activity and shall take into account the needs of such persons in determining the aid, benefits, or services to be provided under the program or activity.

§ 84.39 Private education programs.

(a) A recipient that operates a private elementary or secondary education program may not, on the basis of handicap, exclude a qualified handicapped person from such program if the person can, with minor adjustments, be provided an appropriate education, as defined in § 84.33(b)(1), within the recipient's program.

(b) A recipient to which this section applies may not charge more for the provision of an appropriate education to handicapped persons than to nonhandicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.

(c) A recipient to which this section applies that operates special education programs shall operate such programs in accordance with the provisions of §§ 84.35 and 84.36. Each recipient to which this section applies is subject to the provisions of §§ 84.34, 84.37, and 84.38.

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§ 84.10 (Reserved)

Subpart E—Postsecondary Education

§ 84.11 Application of this subpart.

Subpart E applies to postsecondary education programs and activities, including postsecondary vocational education programs and activities, that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 84.12 Admissions and recruitment.

(a) *General.* Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

(b) *Admissions.* In administering its admission policies, a recipient to which this subpart applies:

(1) May not apply limitations upon the number or proportion of handicapped persons who may be admitted;

(2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Director to be available.

(3) Shall assure itself that (i) admissions tests are selected and administered so as best to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure), (ii) admissions tests that are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as

are other admissions tests; and (iii) admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons; and

(4) Except as provided in paragraph (c) of this section, may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

(c) *Preadmission inquiry exception.* When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 84.6(a) or when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 84.6(b), the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped. *Provided, That:*

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with this part.

(d) *Validity studies.* For the purpose of paragraph (b)(2) of this section, a recipient may base prediction equations on first year grades, but shall conduct periodic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores.

§ 84.13 Treatment of students; general.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical educa-

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tion, athletics, recreation, transportation, other extracurricular or other postsecondary education program or activity to which this subpart applies.

(b) A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient, as part of, or equivalent to, and education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its programs and activities in the most integrated setting appropriate.

§ 84.44 Academic adjustments.

(a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) *Other rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

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(c) *Course examinations.* In its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

§ 84.45 Housing.

(a) *Housing provided by the recipient.* A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. At the end of the transition period provided for in Subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations is, as a whole, comparable to that of nonhandicapped students.

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(b) *Other housing.* A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

§ 84.46 Financial and employment assistance to students.

(a) Provision of financial assistance.

(1) In providing financial assistance to qualified handicapped persons, a recipient to which this subpart applies may not (i), on the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate or (ii) assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped persons on the basis of handicap.

(2) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments that require awards to be made on the basis of factors that discriminate or have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

(b) *Assistance in making available outside employment.* A recipient that assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that such employment opportunities, as a whole, are made available in a manner that would not violate Subpart B if they were provided by the recipient.

(c) *Employment of students by recipients.* A recipient that employs any of its students may not do so in a manner that violates Subpart B.

§ 84.47 Nonacademic services.

(a) Physical education and athletics

(1) In providing physical education courses and athletics and similar pro-

grams and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of § 84.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

(b) *Counseling and placement services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities. This requirement does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.

(c) *Social organizations.* A recipient that provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

§§ 84.48—84.50 [Reserved]

Subpart F—Health, Welfare, and Social Services

§ 84.51 Application of this subpart.

Subpart F applies to health, welfare, and other social service programs and activities that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial as-

assistance for the operation of, such programs or activities

§ 84.52 Health, welfare, and other social services.

(a) *General* In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of handicap:

(1) Deny a qualified handicapped person these benefits or services.

(2) Afford a qualified handicapped person an opportunity to receive benefits or services that is not equal to that offered nonhandicapped persons.

(3) Provide a qualified handicapped person with benefits or services that are not as effective (as defined in § 84.4(b)) as the benefits or services provided to others.

(4) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons, or

(5) Provide different or separate benefits or services to handicapped persons except where necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

(b) *Notice* A recipient that provides notice concerning benefits or services or written material concerning waivers of rights or consent to treatment shall take such steps as are necessary to ensure that qualified handicapped persons, including those with impaired sensory or speaking skills, are not denied effective notice because of their handicap.

(c) *Emergency treatment for the hearing impaired* A recipient hospital that provides health services or benefits shall establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care.

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies that employs fifteen or more persons shall provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.

(2) The Director may require recipients with fewer than fifteen employees to provide auxiliary aids where the

provision of aids would not significantly impair the ability of the recipient to provide its benefits or services

(3) For the purpose of this paragraph, auxiliary aids may include brailled and taped material, interpreters, and other aids for persons with impaired hearing or vision.

§ 84.53 Drug and alcohol addicts.

A recipient to which this subpart applies that operates a general hospital or outpatient facility may not discriminate in admission or treatment against a drug or alcohol abuser or alcoholic who is suffering from a medical condition, because of the person's drug or alcohol abuse or alcoholism.

§ 84.54 Education of institutionalized persons.

A recipient to which this subpart applies and that operates or supervises a program or activity for persons who are institutionalized because of handicap shall ensure that each qualified handicapped person, as defined in § 84.3(k)(2), in its program or activity is provided an appropriate education, as defined in § 84.33(b). Nothing in this section shall be interpreted as altering in any way the obligations of recipients under Subpart D.

§§ 84.55-84.60 [Reserved]

Subpart G—Procedures

§ 84.61 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 80.6-80.10 and Part 81 of this Title.

(42 FR 22677, May 4, 1977, 42 FR 22888, May 5, 1977)

§§ 84.62-84.99 [Reserved]

Note. Incorporation by reference provisions approved by the Director of the Federal Register, May 27, 1975. Incorporated documents are on file at the Office of the Federal Register.

(42 FR 22677, May 4, 1977, 42 FR 22888, May 5, 1977)

APPENDIX A—ANALYSIS OF FINAL REGULATION

SUBPART A—GENERAL PROVISIONS

Definitions—1. "Recipient" Section 84.23 contains definitions used throughout the regulation. Most of the comments concerning § 84.3(f), which contains the definition of "recipient," commended the inclusion of recipient whose sole source of Federal financial assistance is Medicaid. The Secretary believes that such Medicaid providers should be regarded as recipients under the statute and the regulation and should be held individually responsible for administering services in a nondiscriminatory fashion. Accordingly, § 84.3(f) has not been changed. Small Medicaid providers, however, are exempt from some of the regulation's administrative provisions (those that apply to recipients with fifteen or more employees). And such recipients will be permitted to refer patients to accessible facilities in certain limited circumstances under revised § 84.22(b). The Secretary recognizes the difficulties involved in federal enforcement of this regulation with respect to thousands of individual Medicaid providers. As in the case of title VI of the Civil Rights Act of 1964, the Office for Civil Rights will concentrate its compliance efforts on the state Medicaid agencies and will look primarily to them to ensure compliance by individual providers.

One other comment requested that the regulation specify that nonpublic elementary and secondary schools that are not otherwise recipients do not become recipients by virtue of the fact their students participate in certain federally funded programs. The Secretary believes it unnecessary to amend the regulation in this regard, because almost identical language in the Department's regulations implementing title VI and Title IX of the Education Amendments of 1972 has consistently been interpreted so as not to render such schools recipients. These schools, however, are indirectly subject to the substantive requirements of this regulation through the application of § 84.4(b)(iv), which prohibits recipients from assisting agencies that discriminate on the basis of handicap in providing services to beneficiaries of the recipients' programs.

2. *"Federal financial assistance"* In § 84.3(h), defining federal financial assistance, a clarifying change has been made: procurement contracts are specifically excluded. They are covered, however, by the Department of Labor's regulation under section 503. The Department has never considered such contracts to be contracts of assistance, the explicit exemption has been added only to avoid possible confusion.

The proposed regulation's exemption of contracts of insurance or guaranty has been

retained. A number of comments argued for its deletion on the ground that section 504, unlike title VI and title IX, contains no statutory exemption for such contracts. There is no indication, however, in the legislative history of the Rehabilitation Act of 1973 or of the amendments to that Act in 1974, that Congress intended section 504 to have a broader application. In terms of federal financial assistance, than other civil rights statutes. Indeed, Congress directed that section 504 be implemented in the same manner as titles VI and IX. In view of the long established exemption of contracts of insurance or guaranty under title VI, we think it unlikely that Congress intended section 504 to apply to such contracts.

In its May 1976 Notice of Intent, the Department suggested that the arrangement under which individual practitioners, hospitals, and other facilities receive reimbursement for providing services to beneficiaries under Part B of title XVIII of the Social Security Act (Medicare) constitutes a contract of insurance or guaranty and thus falls within the exemption from the regulation. This explanation oversimplified the Department's view of whether Medicare Part B constitutes Federal financial assistance. The Department's position has consistently been that, whether or not Medicare Part B arrangements involve a contract of insurance or guaranty, no Federal financial assistance flows from the Department to the doctor or other practitioner under the program, since Medicare Part B—like other social security programs—is basically a program of payments to direct beneficiaries.

3. *"Handicapped person"* Section 84.3(j), which defines the class of persons protected under the regulation, has not been substantially changed. The definition of handicapped person in paragraph (j)(1) conforms to the statutory definition of handicapped person that is applicable to section 504, as set forth in section 111(a) of the Rehabilitation Act Amendments of 1974, Pub. L. 93-516.

The first of the three parts of the statutory and regulatory definition includes any person who has a physical or mental impairment that substantially limits one or more major life activities. Paragraph (j)(2)(i) further defines physical or mental impairments. The definition does not set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list. The term includes, however, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and, as discussed below, drug addiction and alcoholism.

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It should be emphasized that a physical or mental impairment does not constitute a handicap for purposes of section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities. Several comments observed the lack of any definition in the proposed regulation of the phrase "substantially limits." The Department does not believe that a definition of this term is possible at this time.

A related issue raised by several comments is whether the definition of handicapped person is unreasonably broad. Comments suggested narrowing the definition in various ways the most common recommendation was that only "traditional" handicaps be covered. The Department continues to believe, however, that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps. The Department intends, however, to give particular attention in its enforcement of section 504 to eliminating discrimination against persons with the severe handicaps that were the focus of concern in the Rehabilitation Act of 1973.

The definition of handicapped person also includes specific limitations on what persons are classified as handicapped under the regulation. The first of the three parts of the definition specifies that only physical and mental handicaps are included. Thus, environmental, cultural, and economic disadvantage are not in themselves covered, nor are prison records, age, or homosexuality. Of course, if a person who has any of these characteristics also has a physical or mental handicap, the person is included within the definition of handicapped person.

In paragraph (j)(2)(i), physical or mental impairment is defined to include, among other impairments, specific learning disabilities. The Department will interpret the term as it is used in section 602 of the Education of the Handicapped Act, as amended. Paragraph (15) of section 602 uses the term "specific learning disabilities" to describe such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

Paragraph (j)(2)(i) has been shortened, but not substantively changed, by the deletion of clause (C), which made explicit the inclusion of any condition which is mental or physical but whose precise nature is not at present known. Clauses (A) and (B) clearly comprehend such conditions.

The second part of the statutory and regulatory definition of handicapped person includes any person who has a record of a physical or mental impairment that substantially limits a major life activity. Under the definition of "record" in paragraph

(j)(2)(ii), persons who have a history of a handicapping condition but no longer have the condition, as well as persons who have been incorrectly classified as having such a condition, are protected from discrimination under section 504. Frequently occurring examples of the first group are persons with histories of mental or emotional illness, heart disease, or cancer, of the second group, persons who have been misclassified as mentally retarded.

The third part of the statutory and regulatory definition of handicapped person includes any person who is regarded as having a physical or mental impairment that substantially limits one or more major life activities. It includes many persons who are ordinarily considered to be handicapped but who do not technically fall within the first two parts of the statutory definition, such as persons with a limp. This part of the definition also includes some persons who might not ordinarily be considered handicapped, such as persons with disfiguring scars, as well as persons who have no physical or mental impairment but are treated by a recipient as if they were handicapped.

4. *Drug addicts and alcoholics* As was the case during the first comment period, the issue of whether to include drug addicts and alcoholics within the definition of handicapped person was of major concern to many commenters. The arguments presented on each side of the issue were similar during the two comment periods, as was the preference of commenters for exclusion of this group of persons. While some comments reflected misconceptions about the implications of including alcoholics and drug addicts within the scope of the regulation, the Secretary understands the concerns that underlie the comments on this question and recognizes that application of section 504 to active alcoholics and drug addicts presents sensitive and difficult questions that must be taken into account in interpretation and enforcement.

The Secretary has carefully examined the issue and has obtained a legal opinion from the Attorney General. That opinion concludes that drug addiction and alcoholism are "physical or mental impairments" within the meaning of section 7(6) of the Rehabilitation Act of 1973, as amended, and that drug addicts and alcoholics are therefore handicapped for purposes of section 504 if their impairment substantially limits one of their major life activities. The Secretary therefore believes that he is without authority to exclude these conditions from the definition. There is a medical and legal consensus that alcoholism and drug addiction are diseases, although there is disagreement as to whether they are primarily mental or physical. In addition, while Congress did not focus specifically on the problems of drug addiction and alcoholism in en-

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acting section 504, the committees that considered the Rehabilitation Act of 1973 were made aware of the Department's long-standing practice of treating addicts and alcoholics as handicapped individuals eligible for rehabilitation services under the Vocational Rehabilitation Act.

The Secretary wishes to reassure recipients that inclusion of addicts and alcoholics within the scope of the regulation will not lead to the consequences feared by many commenters. It cannot be emphasized too strongly that the statute and the regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap. The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism. In other words, while an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be taken into account in determining whether he or she is qualified.

With respect to the employment of a drug addict or alcoholic, if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question. For example, in making employment decisions, a recipient may judge addicts and alcoholics on the same basis it judges all other applicants and employees. Thus, a recipient may consider—for all applicants including drug addicts and alcoholics—past personnel records, absenteeism, disruptive, abusive, or dangerous behavior, violations of rules and unsatisfactory work performance. Moreover, employers may enforce rules prohibiting the possession or use of alcohol or drugs in the workplace, provided that such rules are enforced against all employees.

With respect to services, there is evidence that drug addicts and alcoholics are often denied treatment at hospitals for conditions unrelated to their addiction or alcoholism. In addition, some addicts and alcoholics have been denied emergency treatment. These practices have been specifically prohibited by section 407 of the Drug Abuse Office and Treatment Act of 1972 (21 USC 1174) and section 321 of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (42 USC 4581), as amended. These statutory provisions are also administered by the Department's Office for Civil Rights and

are implemented in § 84.53 of this regulation.

With respect to other services, the implications of coverage of alcoholics and drug addicts are two-fold: first, no person may be excluded from services solely by reason of the presence or history of these conditions, second, to the extent that the manifestations of the condition prevent the person from meeting the basic eligibility requirements of the program or cause substantial interference with the operation of the program, the condition may be taken into consideration. Thus, a college may not exclude an addict or alcoholic as a student, on the basis of addiction or alcoholism, if the person can successfully participate in the education program and complies with the rules of the college and if his or her behavior does not impede the performance of other students.

Of great concern to many commenters was the question of what effect the inclusion of drug addicts and alcoholics as handicapped persons would have on school disciplinary rules prohibiting the use or possession of drugs or alcohol by students. Neither such rules nor their application to drug addicts or alcoholics is prohibited by this regulation, provided that the rules are enforced evenly with respect to all students.

5. *"Qualified handicapped person."* Paragraph (k) of § 84.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

Section 84.3(k)(1) defines a qualified handicapped person with respect to employment as a handicapped person who can, with reasonable accommodation, perform the essential functions of the job in question. The term "essential functions" does not appear in the corresponding provision of the Department of Labor's section 503 regulation, and a few commenters objected to its inclusion on the ground that a handicapped person should be able to perform all job tasks. However, the Department believes that inclusion of the phrase is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that

bear only a marginal relationship to a particular job. Further, we are convinced that inclusion of the phrase is not inconsistent with the Department of Labor's application of its definition.

Certain commenters urged that the definition of qualified handicapped person be amended so as explicitly to place upon the employer the burden of showing that a particular mental or physical characteristic is essential. Because the same result is achieved by the requirement contained in paragraph (a) of § 84.13, which requires an employer to establish that any selection criterion that tends to screen out handicapped persons is job related, that recommendation has not been followed.

Section 84.3(k)(2) (formerly § 84.3(k)(3)) defines qualified handicapped person, with respect to preschool, elementary, and secondary programs, in terms of age. Several commenters recommended that eligibility for the services be based upon the standard of substantial benefit, rather than age, because of the need of many handicapped children for early or extended services if they are to have an equal opportunity to benefit from education programs. No change has been made in this provision, again because of the extreme difficulties in administration that would result from the choice of the former standard. Under the remedial action provisions of § 84.6(a)(3), however, persons beyond the age limits prescribed in § 84.3(k)(2) may in appropriate cases be required to be provided services that they were formerly denied because of a recipient's violation of section 504.

Section 84.3(k)(2) states that a handicapped person is qualified for preschool, elementary, or secondary services if the person is of an age at which nonhandicapped persons are eligible for such services or at which state law mandates the provision of educational services to handicapped persons. In addition, the extended age ranges for which recipients must provide full educational opportunity to all handicapped persons in order to be eligible for assistance under the Education of the Handicapped Act—generally 3-18 as of September 1978 and 3-21 as of September 1980 are incorporated by reference in this paragraph.

Section 84.3(k)(3) formerly § 84.3(k)(2) defines qualified handicapped person with respect to postsecondary educational programs. As revised the paragraph means that both academic and technical standards must be met by applicants to these programs. The term "technical standards" refers to all nonacademic admissions criteria that are essential to participation in the program in question.

6 General prohibitions against discrimination. Section 84 contains general prohibitions against discrimination applicable to

all recipients of assistance from this Department.

Paragraph (b)(1)(i) prohibits the exclusion of qualified handicapped persons from aids, benefits, or services, and paragraph (ii) requires that equal opportunity to participate or benefit be provided. Paragraph (iii) requires that services provided to handicapped persons be as effective as those provided to the nonhandicapped. In paragraph (iv), different or separate services are prohibited except when necessary to provide equally effective benefits.

In this context, the term "equally effective," defined in paragraph (b)(2), is intended to encompass the concept of equivalent, as opposed to identical, services and to acknowledge the fact that in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. For example, a welfare office that uses the telephone for communicating with its clients must provide alternative modes of communicating with its deaf clients. This standard parallels the one established under title VI of Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See *Lau v. Nichols*, 414 U.S. 563 (1974). To be equally effective, however, an aid, benefit, or service need not produce equal results. It merely must afford an equal opportunity to achieve equal results.

It must be emphasized that, although separate services must be required in some instances, the provision of unnecessarily separate or different services is discriminatory. The addition to paragraph (b)(2) of the phrase "in the most integrated setting appropriate to the person's needs" is intended to reinforce this general concept. A new paragraph (b)(3) has also been added to § 84.4, requiring recipients to give qualified handicapped persons the option of participating in regular programs despite the existence of permissibly separate or different programs. The requirement has been reiterated in §§ 84.38 and 84.47 in connection with physical education and athletics programs.

Section 84.4(b)(1)(iv) prohibits a recipient from supporting another entity or person that subjects participants or employees in the recipient's program to discrimination on the basis of handicap. This section would, for example, prohibit financial support by a recipient to a community recreational group or to a professional or social organization that discriminates against handicapped persons. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient and the other entity, including financial support by the recipient, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself. Paragraph (b)(1)(vi) was added in response to comment in order to make explicit the prohibition against denying qualified handicapped persons the opportunity to serve on planning and advisory boards responsible for guiding federally assisted programs or activities.

Several comments appeared to interpret § 84.4(b)(5), which proscribes discriminatory site selection, to prohibit a recipient that is located on hilly terrain from erecting any new buildings at its present site. That, of course, is not the case. This paragraph is not intended to apply to construction of additional buildings at an existing site. Of course, any such facilities must be made accessible in accordance with the requirements of § 84.23.

7 Assurances of compliance. Section 84.5(a) requires a recipient to submit to the Director an assurance that each of its programs and activities receiving or benefiting from Federal financial assistance from this Department will be conducted in compliance with this regulation. To facilitate the submission of assurances by thousands of Medicaid providers, the Department will follow the title VI procedures of accepting, in lieu of assurances, certification on Medicaid vouchers. Many commenters also sought relief from the paperwork requirements imposed by the Department's enforcement of its various civil rights responsibilities by requesting the Department to issue one form incorporating title VI, title IX, and section 504 assurances. The Secretary is sympathetic to this request. While it is not feasible to adopt a single civil rights assurance form at this time, the Office for Civil Rights will work toward that goal.

8 Private rights of action. Several comments urged that the regulation incorporate provision granting beneficiaries a private right of action against recipients under section 504. To confer such a right is beyond the authority of the executive branch of Government. There is, however, case law holding that such a right exists. *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977), see *Harston v. Drosick*, Civil No. 75-0691 (S.D. W. Va., Jan. 14, 1976), *Gurmantin v. Castanzo*, 411 F. Supp. 982 (E.D. Pa. 1976), cf. *Lau v. Nichols* supra.

9 Remedial action. Where there has been a finding of discrimination, § 84.6 requires a recipient to take remedial action to overcome the effects of the discrimination. Actions that might be required under paragraph (a)(1) include provision of services to persons previously discriminated against, reinstatement of employees and development of a remedial action plan. Should a recipient fail to take required remedial action, the ultimate sanctions of court action or termination of Federal financial assistance may be imposed.

Paragraph (a)(2) extends the responsibility for taking remedial action to a recipient that exercises control over a noncomplying recipient. Paragraph (a)(3) also makes clear that handicapped persons who are not in the program at the time that remedial action is required to be taken may also be the subject of such remedial action. This paragraph has been revised in response to comments in order to include persons who would have been in the program if discriminatory practices had not existed. Paragraphs (a)(1), (2), and (3) have also been amended in response to comments to make plain that, in appropriate cases, remedial action might be required to redress clear violations of the statute itself that occurred before the effective date of this regulation.

10 Voluntary action. In § 84.6(b), the term "voluntary action" has been substituted for the term "affirmative action" because the use of the latter term led to some confusion. We believe the term "voluntary action" more accurately reflects the purpose of the paragraph. This provision allows action, beyond that required by the regulation, to overcome conditions that led to limited participation by handicapped persons, whether or not the limited participation was caused by any discriminatory actions on the part of the recipient. Several commenters urged that paragraphs (a) and (b) be revised to require remedial action to overcome effects of prior discriminatory practices regardless of whether there has been an express finding of discrimination. The self-evaluation requirement in paragraph (c) accomplishes much the same purpose.

11 Self-evaluation. Paragraph (c) requires recipients to conduct a self-evaluation in order to determine whether their policies or practices may discriminate against handicapped persons and to take steps to modify any discriminatory policies and practices and their effects. The Department received many comments approving of the addition to paragraph (c) of a requirement that recipients seek the assistance of handicapped persons in the self-evaluation process. This paragraph has been further amended to require consultation with handicapped persons or organizations representing them before recipients undertake the policy modifications and remedial steps prescribed in paragraphs (c)(ii) and (iii).

Paragraph (c)(2), which sets forth the recordkeeping requirements concerning self-evaluation, now applies only to recipients with fifteen or more employees. This change was made as part of an effort to reduce unnecessary or counterproductive administrative obligations on small recipients. For those recipients required to keep records, the requirements have been made

timely and clear. The Department will continue to monitor the effectiveness of these requirements and will make adjustments as needed.

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more specific records must include a list of persons consulted and a description of areas examined, problems identified, and corrective steps taken. Moreover, the records must be made available for public inspection.

12 *Grievance procedure.* Section 84.7 (formerly § 84.8) requires recipients with fifteen or more employees to designate an individual responsible for coordinating its compliance efforts and to adopt a grievance procedure. Two changes were made in the section in response to comment. A general requirement that appropriate due process procedures be followed has been added. It was decided that the details of such procedures could not at this time be specified because of the varied nature of the persons and entities who must establish the procedures and of the programs to which they apply. A sentence was also added to make clear that grievance procedures are not required to be made available to unsuccessful applicants for employment or to applicants for admission to colleges and universities.

The regulation does not require that grievance procedures be exhausted before recourse is sought from the Department. However, the Secretary believes that it is desirable and efficient in many cases for complainants to seek resolution of their complaints and disputes at the local level and therefore encourages them to use available grievance procedures.

A number of comments asked whether compliance with this section or the notice requirements of § 84.8 could be coordinated with comparable action required by the title IX regulation. The Department encourages such efforts.

13 *Notice.* Section 84.8 (formerly § 84.9) sets forth requirements for dissemination of statements of nondiscrimination policy by recipients.

It is important that both handicapped persons and the public at large be aware of the obligations of recipients under section 504. Both the Department and recipients have responsibilities in this regard. Indeed, the Department intends to undertake a major public information effort to inform persons of their rights under section 504 and this regulation. In § 84.8 the Department has sought to impose a clear obligation on major recipients to notify beneficiaries and employees of the requirements of section 504, without dictating the precise way in which this notice must be given. At the same time, we have avoided imposing requirements on small recipients (those with fewer than fifteen employees) that would create unnecessary and counterproductive paper work burdens on them and unduly stretch the enforcement resources of the Department.

Section 84.8(a) as simplified requires recipients with fifteen or more employees to take appropriate steps to notify beneficia-

ries and employees of the recipient's obligations under section 504. The last sentence of § 84.8(a) has been revised to list possible, rather than required, means of notification. Section 84.8(b) requires recipients to include a notification of their policy of nondiscrimination in recruitment and other general information materials.

In response to a number of comments, § 84.8 has been revised to delete the requirements of publication in local newspapers, which has proved to be both troublesome and ineffective. Several commenters suggested that notification on separate forms be allowed until present stocks of publications and forms are depleted. The final regulation explicitly allows this method of compliance. The separate form should, however, be included with each significant publication or form that is distributed.

Former § 84.9(b)(2), which prohibited the use of materials that might give the impression that a recipient excludes qualified handicapped persons from its program, has been deleted. The Department is convinced by the comments that this provision is unnecessary and difficult to apply. The Department encourages recipients, however, to include in their recruitment and other general information materials photographs of handicapped persons and ramps and other features of accessible buildings.

Under new § 84.9 the Director may, under certain circumstances, require recipients with fewer than fifteen employees to comply with one or more of these requirements. Thus, if experience shows a need for imposing notice or other requirements on particular recipients or classes of small recipients, the Department is prepared to expand the coverage of these sections.

14 *Inconsistent State laws.* Section 84.10(a) states that compliance with the regulation is not excused by state or local laws limiting the eligibility of qualified handicapped persons to receive services or to practice an occupation. The provision thus applies only with respect to state or local laws that unjustifiably differentiate on the basis of handicap.

Paragraph (b) further points out that the presence of limited employment opportunities in a particular profession, does not excuse a recipient from complying with the regulation. Thus, a law school could not deny admission to a blind applicant because blind lawyers may find it more difficult to find jobs that do not handicap lawyers.

SUBPART B—EMPLOYMENT PRACTICES

Subpart B prescribes requirements for nondiscrimination in the employment practices of recipients of Federal financial assistance administered by the Department. This subpart is consistent with the employment provisions of the Department's regulation implementing title IX of the Education

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Amendments of 1972 (45 CFR Part 86) and the regulation of the Department of Labor under section 503 of the Rehabilitation Act, which requires certain Federal contractors to take affirmative action in the employment and advancement of qualified handicapped persons. All recipients subject to title IX are also subject to this regulation. In addition, many recipients subject to this regulation receive Federal procurement contracts in excess of \$2,500 and are therefore also subject to section 503.

15 *Discriminatory practices.* Section 84.11 sets forth general provisions with respect to discrimination in employment. A new paragraph (a)(2) has been added to clarify the employment obligations of recipients that receive Federal funds under Part B of the Education of the Handicapped Act, as amended (EHA). Section 606 of the EHA obligates elementary or secondary school systems that receive EHA funds to take positive steps to employ and advance in employment qualified handicapped persons. This obligation is similar to the nondiscrimination requirement of section 504 but requires recipients to take additional steps to hire and promote handicapped persons. In enacting section 606 Congress chose the words "positive steps" instead of "affirmative action" advisedly and did not intend section 606 to incorporate the types of activities required under Executive Order 11246 (affirmative action on the basis of race, color, sex, or national origin) or under sections 501 and 503 of the Rehabilitation Act of 1973.

Paragraph (b) of § 84.11 sets forth the specific aspects of employment covered by the regulation. Paragraph (c) provides that inconsistent provisions of collective bargaining agreements do not excuse noncompliance.

16 *Reasonable accommodation.* The reasonable accommodation requirement of § 84.12 generated a substantial number of comments. The Department remains convinced that its approach is both fair and effective. Moreover, the Department of Labor reports that it has experienced little difficulty in administering the requirements of reasonable accommodation. The provision therefore remains basically unchanged from the proposed regulation.

Section 84.12 requires a recipient to make reasonable accommodation to the known physical or mental limitations of a handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program. Where a handicapped person is not qualified to perform a particular job, where reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the

handicapped person will not be considered discrimination.

Section 84.12(b) lists some of the actions that constitute reasonable accommodation. The list is neither all-inclusive nor meant to suggest that employers must follow all of the actions listed.

Reasonable accommodation includes modification of work schedules, including part-time employment, and job restructuring. Job restructuring may entail shifting nonessential duties to other employees. In other cases, reasonable accommodation may include physical modifications or relocation of particular offices or jobs so that they are in facilities or parts of facilities that are accessible to and usable by handicapped persons. If such accommodations would cause undue hardship to the employer, they need not be made.

Paragraph (c) of this section sets forth the factors that the Office for Civil Rights will consider in determining whether an accommodation necessary to enable an applicant or employee to perform the duties of a job would impose an undue hardship. The weight given to each of these factors in making the determination as to whether an accommodation constitutes undue hardship will vary depending on the facts of a particular situation. Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. Further, it might be considered reasonable to require a state welfare agency to accommodate a deaf employee by providing an interpreter, while it would constitute an undue hardship to impose that requirement on a provider of foster home care services. The reasonable accommodation standard in § 84.12 is similar to the obligation imposed upon Federal contractors in the regulation implementing section 503 of the Rehabilitation Act of 1973, administered by the Department of Labor. Although the wording of the reasonable accommodation provisions of the two regulations is not identical, the obligation that the two regulations impose is the same, and the Federal Government's policy in implementing the two sections will be uniform. The Department adopted the factors listed in paragraph (c) instead of the "business necessity" standard of the Labor regulation because that term seemed inappropriate to the nature of the programs operated by the majority of institutions subject to this regulation, e.g., public school systems, hospitals, colleges and universities, nursing homes, day-care centers and welfare offices. The factors listed in paragraph (c) are intended to make the rationale underlying the business neces-

sity standard applicable to an understanding by recipients of HEW funds.

17 *Tests and selection criteria* Revised § 84.13(a) prohibits employers from using test or other selection criteria that screen out or tend to screen out handicapped persons unless the test or criterion is shown to be job related and alternative tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available. This paragraph is an application of the principle established under title VII of the Civil Rights Act of 1964 in *Griggs v. Duke Power Company* 401 U.S. 424 (1971).

Under the proposed section, a statistical showing of adverse impact on handicapped persons was required to trigger an employer's obligation to show that employment criteria and qualifications relating to handicap were necessary. This requirement was changed because the small number of handicapped persons taking tests would make statistical showings of disproportionate, adverse effect difficult and burdensome. Under the altered, more workable provision once it is shown that an employment test substantially limits the opportunities of handicapped persons, the employer must show the test to be job related. A recipient is no longer limited to using predictive validity studies as the method for demonstrating that a test or other selection criterion is in fact job related. Nor in all cases are predictive validity studies sufficient to demonstrate that a test or criterion is job related. In addition § 84.13(a) has been revised to place the burden on the Director, rather than the recipient, to identify alternative tests.

Section 84.13(b) requires that a recipient take into account that some tests and criteria depend upon sensory, manual, or speaking skills that may not themselves be necessary to the job in question but that may make the handicapped person unable to pass the test. The recipient must select and administer tests so as best to ensure that the test will measure the handicapped person's ability to perform on the job rather than the person's ability to see, hear, speak, or perform manual tasks except of course where such skills are the factors that the test purports to measure. For example, a person with a speech impediment may be perfectly qualified for jobs that do not or need not with reasonable accommodation require ability to speak clearly. Yet if given an oral test the person will be unable to perform in a satisfactory manner. The test results will not therefore, predict job performance but instead will reflect impaired speech.

18 *Preemployment inquiries* Section 84.14 concerning preemployment inquiries generated a large number of comments. Commenters representing handicapped per-

sons strongly favored a ban on preemployment inquiries on the ground that such inquiries are often used to discriminate against handicapped persons and are not necessary to serve any legitimate interests of employers. Some recipients, on the other hand, argued that preemployment inquiries are necessary to determine qualifications of the applicant, safety hazards caused by a particular handicapping condition, and accommodations that might be required.

The Secretary has concluded that a general prohibition of preemployment inquiries is appropriate. However, a sentence has been added to paragraph (a) to make clear that an employer may inquire into an applicant's ability to perform job related tasks but may not ask if the person has a handicap. For example, an employer may not ask on an employment form if an applicant is visually impaired but may ask if the person has a current driver's license if that is a necessary qualification for the position in question. Similarly, employers may make inquiries about an applicant's ability to perform a job safely. Thus, an employer may not ask if an applicant is an epileptic but may ask whether the person can perform a particular job without endangering other employees.

Section 84.14(b) allows preemployment inquiries only if they are made in conjunction with required remedial action to correct past discrimination, with voluntary action to overcome past conditions that have limited the participation of handicapped persons, or with obligations under section 503 of the Rehabilitation Act of 1973. In these instances, paragraph (b) specifies certain safeguards that must be followed by the employer.

Finally, the revised provision allows an employer to condition offers of employment to handicapped persons on the results of medical examinations so long as the examinations are administered to all employees in a nondiscriminatory manner and the results are treated on a confidential basis.

19 *Specific acts of discrimination* Sections 84.15 (recruitment), 84.16 (compensation), 84.17 (job classification and structure), and 84.18 (fringe benefits) have been deleted from the regulation as unnecessarily duplicative of § 84.11 (discrimination prohibited). The deletion of these sections in no way changes the substantive obligations of employers subject to this regulation from those set forth in the July 16 proposed regulation. These deletions bring the regulation closer in form to the Department of Labor's section 503 regulation.

Proposed § 84.18 concerning fringe benefits, had allowed for differences in benefits or contributions between handicapped and nonhandicapped persons in situations only where such differences could be justified on an actuarial basis. Section 84.11 simply bars

discrimination in providing fringe benefits and does not address the issue of actuarial differences. The Department believes that currently available data and experience do not demonstrate a basis for promulgating a regulation specifically allowing for differences in benefits or contributions.

SUBPART C—PROGRAM ACCESSIBILITY

In general, Subpart C prohibits the exclusion of qualified handicapped persons from federally assisted programs or activities because a recipient's facilities are inaccessible or unusable.

20 *Existing facilities* Section 84.22 maintains the same standard for nondiscrimination in regard to existing facilities as was included in the proposed regulation. The section states that a recipient's program or activity, when viewed in its entirety, must be readily accessible to and usable by handicapped persons. Paragraphs (a) and (b) make clear that a recipient is not required to make each of its existing facilities accessible to handicapped persons if its program as a whole is accessible. Accessibility to the recipient's program or activity may be achieved by a number of means, including redesign of equipment, reassignment of classes or other services to accessible buildings, and making aides available to beneficiaries. In choosing among methods of compliance, recipients are required to give priority consideration to methods that will be consistent with provision of services in the most appropriate integrated setting. Structural changes in existing facilities are required only where there is no other feasible way to make the recipient's program accessible.

Under § 84.22, a university does not have to make all of its existing classroom buildings accessible to handicapped students if some of its buildings are already accessible and if it is possible to reschedule or relocate enough classes so as to offer all required courses and a reasonable selection of elective courses in accessible facilities. If sufficient relocation of classes is not possible using existing facilities, enough alterations to ensure program accessibility are required. A university may not exclude a handicapped student from a specifically requested course offering because it is not offered in an accessible location, but it need not make every section of that course accessible.

Commenters representing several institutions of higher education have suggested that it would be appropriate for one postsecondary institution in a geographical area to be made accessible to handicapped persons and for other colleges and universities in that area to participate in that school's program thereby developing an educational consortium for the postsecondary education of handicapped students. The Department believes that such a consortium, when devel-

oped and applied only to handicapped persons, would not constitute compliance with § 84.22, but would discriminate against qualified handicapped persons by restricting their choice in selecting institutions of higher education and would, therefore, be inconsistent with the basic objectives of the statute.

Nothing in this regulation, however, should be read as prohibiting institutions from forming consortia for the benefit of all students. Thus, if three colleges decide that it would be cost efficient for one college to offer biology, the second physics, and the third chemistry to all students at the three colleges, the arrangement would not violate section 504. On the other hand, it would violate the regulation if the same institutions set up a consortium under which one college undertook to make its biology lab accessible, another its physics lab, and a third its chemistry lab, and under which mobility impaired handicapped students (but not other students) were required to attend the particular college that is accessible for the desired courses.

Similarly, while a public school district need not make each of its buildings completely accessible, it may not make only one facility or part of a facility accessible if the result is to segregate handicapped students in a single setting.

All recipients that provide health, welfare, or other social services may also comply with § 84.22 by delivering services at alternate accessible sites or making home visits. Thus, for example, a pharmacist might arrange to make home deliveries of drugs. Under revised § 84.22(c), small providers of health, welfare, and social services (those with fewer than fifteen employees) may refer a beneficiary to an accessible provider of the desired service, but only if no means of meeting the program accessibility requirement other than a significant alteration in existing facilities is available. The referring recipient has the responsibility of determining that the other provider is in fact accessible and willing to provide the service. The Secretary believes this "last resort" referral provision is appropriate to avoid imposition of additional costs in the health care area, to encourage providers to remain in the Medicaid program, and to avoid imposing significant costs on small, low budget providers such as day-care centers or foster homes.

A recent change in the tax law may assist some recipients in meeting their obligations under this section. Under section 2122 of the Tax Reform Act of 1976, recipients that pay federal income tax are eligible to claim a tax deduction of up to \$25,000 for architectural and transportation modifications made to improve accessibility for handicapped persons. Many physicians and dentists, among others, may be eligible for this

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tax deduction. See 42 FR 17870 (April 4, 1977) adopting 26 CFR 7.190.

Several commenters expressed concern about the feasibility of compliance with the program accessibility standard. The Secretary believes that the standard is flexible enough to permit recipients to devise ways to make their programs accessible short of extremely expensive or impractical physical changes in facilities. Accordingly, the section does not allow for waivers. The Department is ready at all times to provide technical assistance to recipients in meeting their program accessibility responsibilities. For this purpose the Department is establishing a special technical assistance unit. Recipients are encouraged to call upon the unit staff for advice and guidance both on structural modifications and on other ways of meeting the program accessibility requirement.

Paragraph (d) has been amended to require recipients to make all nonstructural adjustments necessary for meeting the program accessibility standard within sixty days. Only where structural changes in facilities are necessary will a recipient be permitted up to three years to accomplish program accessibility. It should be emphasized that the three year time period is not a waiting period and that all changes must be accomplished as expeditiously as possible. Further, it is the Department's belief, after consultation with experts in the field, that outside ramps to buildings can be constructed quickly and at relatively low cost. Therefore, it will be expected that such structural additions will be made promptly to comply with § 84.22(d).

The regulation continues to provide as did the proposed version, that a recipient planning to achieve program accessibility by making structural changes must develop a transition plan for such changes within six months of the effective date of the regulation. A number of commenters suggested extending that period to one year. The Secretary believes that such an extension is unnecessary and unwise. Planning for any necessary structural changes should be undertaken promptly to ensure that they can be completed within the three year period. The elements of the transition plan as required by the regulation remain virtually unchanged from the proposal but § 84.22(d) now includes a requirement that the recipient make the plan available for public inspection.

Several commenters expressed concern that the program accessibility standard would result in the segregation of handicapped persons in educational institutions. The regulation will not be applied to permit such a result. See § 84.40(c)(2)(iv) prohibiting unnecessarily separate treatment. § 84.35 requiring that students in elementary and secondary schools be educated in

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the most integrated setting appropriate to their needs, and new § 84.43(d), applying the same standard to postsecondary education.

We have received some comments from organizations of handicapped persons on the subject of requiring, over an extended period of time, a barrier free environment—that is, requiring the removal of all architectural barriers in existing facilities. The Department has considered these comments but has decided to take no further action at this time concerning these suggestions, believing that such action should only be considered in light of experience in implementing the program accessibility standard.

21. *New construction.* Section 84.23 requires that all new facilities, as well as alterations that could affect access to and use of existing facilities, be designed and constructed in a manner so as to make the facility accessible to and usable by handicapped persons. Section 84.23(a) has been amended so that it applies to each newly constructed facility if the construction was commenced after the effective date of the regulation. The words "if construction has commenced" will be considered to mean "if groundbreaking has taken place." Thus, a recipient will not be required to alter the design of a facility that has progressed beyond groundbreaking prior to the effective date of the regulation.

Paragraph (b) requires certain alterations to conform to the requirement of physical accessibility in paragraph (a). If an alteration is undertaken to a portion of a building the accessibility of which could be improved by the manner in which the alteration is carried out, the alteration must be made in that manner. Thus, if a doorway or wall is being altered, the door or other wall opening must be made wide enough to accommodate wheelchairs. On the other hand, if the alteration consists of altering ceilings, the provisions of this section are not applicable because this alteration cannot be done in a way that affects the accessibility of that portion of the building. The phrase "to the maximum extent feasible" has been added to allow for the occasional case in which the nature of an existing facility is such as to make it impractical or prohibitively expensive to renovate the building in a manner that results in its being entirely barrier free. In all such cases, however, the alteration should provide the maximum amount of physical accessibility feasible.

As proposed, § 84.23(c) required compliance with the American National Standards Institute (ANSI) standard on Building Accessibility as the minimum necessary for compliance with the accessibility requirement of § 84.23 (a) and (b). The reference to the ANSI standard created some ambiguity, since the standard itself provides for waivers where other methods are equally effective in providing accessibility to the facility.

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Moreover, the Secretary does not wish to discourage innovation in barrier-free construction by requiring absolute adherence to a rigid design standard. Accordingly, § 84.23 (c) has been revised to permit departures from particular requirements of the ANSI standard where the recipient can demonstrate that equivalent access to the facility is provided.

Section 84.23(d) of the proposed regulation providing for a limited deferral of action concerning facilities that are subject to section 502 as well as section 504 of the Act, has been deleted. The Secretary believes that the provision is unnecessary and inappropriate to this regulation. The Department will, however, seek to coordinate enforcement activities under this regulation with those of the Architectural and Transportation Barriers Compliance Board.

SUBPART D—PRESCHOOL, ELEMENTARY, AND SECONDARY EDUCATION

Subpart D sets forth requirements for nondiscrimination in preschool, elementary, secondary, and adult education programs and activities, including secondary vocational education programs. In this context, the term "adult education" refers only to those educational programs and activities for adults that are operated by elementary and secondary schools.

The provisions of Subpart D apply to state and local educational agencies. Although the subpart applies, in general, to both public and private education programs and activities that are federally assisted, §§ 84.32 and 84.33 apply only to public programs and § 84.39 applies only to private programs. §§ 84.35 and 84.36 apply both to public programs and to those private programs that include special services for handicapped students.

Subpart B generally conforms to the standards established for the education of handicapped persons in *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 344 F. Supp. 1257 (E.D. 1971), 343 F. Supp. 279 (E.D. Pa. 1972), and *Lebanks v. Spears*, 60, F.R.D. 133 (E.D. La. 1973), as well as in the Education of the Handicapped Act, as amended by Public Law 94-142 (the EHA).

The basic requirements common to those cases, to the EHA, and to this regulation are (1) that handicapped persons, regardless of the nature or severity of their handicap, be provided a free appropriate public education.

(2) that handicapped students be educated with nonhandicapped students to the maximum extent appropriate to their needs, (3) that educational agencies undertake to identify and locate all unserved handicapped children, (4) that evaluation procedures be

improved in order to avoid the inappropriate education that results from the misclassification of students, and (5) that procedural safeguards be established to enable parents and guardians to influence decisions regarding the evaluation and placement of their children. These requirements are designed to ensure that no handicapped child is excluded from school on the basis of handicap and, if a recipient demonstrates that placement in a regular educational setting cannot be achieved satisfactorily, that the student is provided with adequate alternative services suited to the student's needs without additional cost to the student's parents or guardian. Thus, a recipient that operates a public school system must either educate handicapped children in its regular program or provide such children with an appropriate alternative education at public expense.

It is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the school district complies with the "process" requirements of this subpart (concerning identification and location, evaluation, and due process procedures). However, the Department will place a high priority on investigating cases which may involve exclusion of a child from the education system or a pattern or practice of discriminatory placements or education.

22. *Location and notification.* Section 84.32 requires public schools to take steps annually to identify and locate handicapped children who are not receiving an education and to publicize to handicapped children and their parents the rights and duties established by section 504 and this regulation. This section has been shortened without substantive change.

23. *Free appropriate public education.* Former §§ 84.34 ("Free education") and 84.36(a) ("Suitable education") have been consolidated and revised in new § 84.33. Under § 84.34(a), a recipient is responsible for providing a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction. The word "in" encompasses the concepts of both domicile and actual residence. If a recipient places a child in a program other than its own, it remains financially responsible for the child, whether or not the other program is operated by another recipient or educational agency. Moreover, a recipient may not place a child in a program that is inappropriate or that otherwise violates the requirements of Subpart D. And in no case may a recipient refuse to provide services to a handicapped child in its jurisdiction because of another person's or entity's failure to assume financial responsibility.

Section 84.33(b) concerns the provision of appropriate educational services to handi-

capped children. To be appropriate, such services must be designed to meet handicapped children's individual educational needs to the same extent that those of non-handicapped children are met. An appropriate education could consist of education in regular classes, education in regular classes with the use of supplementary services, or special education and related services. Special education may include specially designed instruction in classrooms, at home, or in private or public institutions and may be accompanied by such related services as developmental, corrective, and other supportive services (including psychological, counseling, and medical diagnostic services). The placement of the child must however, be consistent with the requirements of § 84.34 and be suited to his or her educational needs.

The quality of the educational services provided to handicapped students must equal that of the services provided to non-handicapped students, thus, handicapped student's teachers must be trained in the instruction of persons with the handicap in question and appropriate materials and equipment must be available. The Department is aware that the supply of adequately trained teachers may, at least at the outset of the imposition of this requirement, be insufficient to meet the demand of all recipients. This factor will be considered in determining the appropriateness of the remedy for noncompliance with this section. A new § 84.33(b)(2) has been added, which allows this requirement to be met through the full implementation of an individualized education program developed in accordance with the standards of the EHA.

Paragraph (c) of § 84.33 sets forth the specific financial obligations of a recipient. If a recipient does not itself provide handicapped persons with the requisite services, it must assume the cost of any alternate placement. If, however, a recipient offers adequate services and if alternate placement is chosen by a student's parent or guardian, the recipient need not assume the cost of the outside services. (If the parent or guardian believes that his or her child cannot be suitably educated in the recipient's program, he or she may make use of the procedures established in § 84.36.) Under this paragraph, a recipient's obligation extends beyond the provision of tuition payments in the case of placement outside the regular program. Adequate transportation must also be provided. Recipients must also pay for psychological services and those medical services necessary for diagnostic and evaluative purposes.

If the recipient places a student, because of his or her handicap, in a program that necessitates his or her being away from home, the payments must also cover room and board and nonmedical care (including

custodial and supervisory care). When residential care is necessitated not by the student's handicap but by factors such as the student's home conditions, the recipient is not required to pay the cost of room and board.

Two new sentences have been added to paragraph (c)(1) to make clear that a recipient's financial obligations need not be met solely through its own funds. Recipients may rely on funds from any public or private source including insurers and similar third parties.

The EHA requires a free appropriate education to be provided to handicapped children "no later than September 1, 1978," but section 504 contains no authority for delaying enforcement. To resolve this problem, a new paragraph (d) has been added to § 84.33. Section 84.33(d) requires recipients to achieve full compliance with the free appropriate public education requirements of § 84.33 as expeditiously as possible, but in no event later than September 1, 1978. The provision also makes clear that, as of the effective date of this regulation, no recipient may exclude a qualified handicapped child from its educational program. This provision against exclusion is consistent with the order of providing services set forth in section 612(3) of the EHA, which places the highest priority on providing services to handicapped children who are not receiving an education.

24. *Educational setting.* Section 84.34 prescribes standards for educating handicapped persons with nonhandicapped persons to the maximum extent appropriate to the needs of the handicapped person in question. A handicapped student may be removed from the regular educational setting only where the recipient can show that the needs of the student would, on balance, be served by placement in another setting.

Although under § 84.34, the needs of the handicapped person are determinative as to proper placement, it should be stressed that, where a handicapped student is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs and would not be required by § 84.34.

Among the factors to be considered in placing a child is the need to place the child as close to home as possible. A new sentence has been added to paragraph (a) requiring recipients to take this factor into account. As pointed out in several comments, the parents' right under § 84.36 to challenge the placement of their child extends not only to placement in special classes or separate schools but also to placement in a distant school and, in particular, to residential placement. An equally appropriate educa-

tional program may exist closer to home. This issue may be raised by the parent or guardian under §§ 84.34 and 84.36.

New paragraph (b) specified that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children.

Section 84.34(c) (formerly § 84.38) requires that any facilities that are identifiable as being for handicapped students be comparable in quality to other facilities of the recipient. A number of comments objected to this section on the basis that it encourages the creation and maintenance of such facilities. This is not the intent of the provision. A separate facility violates section 504 unless it is indeed necessary to the provision of an appropriate education to certain handicapped students. In those instances in which such facilities are necessary (as might be the case, for example, for severely retarded persons), this provision requires that the educational services provided be comparable to those provided in the facilities of the recipient that are not identifiable as being for handicapped persons.

25. *Evaluation and placement.* Because the failure to provide handicapped persons with an appropriate education is so frequently the result of misclassification or misplacement, section 84.33(b)(1) makes compliance with its provisions contingent upon adherence to certain procedures designed to ensure appropriate classification and placement. These procedures, delineated in §§ 84.35 and 84.36, are concerned with testing and other evaluation methods and with procedural due process rights.

Section 84.35(a) requires that an individual evaluation be conducted before any action is taken with respect either to the initial placement of a handicapped child in a regular or special education program or to any subsequent significant change in that placement. Thus, a full reevaluation is not required every time an adjustment in placement is made. "Any action" includes denials of placement.

Paragraphs (b) and (c) of § 84.35 establishes procedures designed to ensure that children are not misclassified, unnecessarily labeled as being handicapped, or incorrectly placed because of inappropriate selection, administration, or interpretation of evaluation materials. This problem has been extensively documented in "Issues in the Classification of Children," a report by the Project on Classification of Exceptional Children, in which the HEW Interagency Task Force participated. The provisions of these

paragraphs are aimed primarily at abuses in the placement process that result from misuse of, or undue or misplaced reliance on, standardized scholastic aptitude tests.

Paragraph (b) has been shortened but not substantively changed. The requirement in former subparagraph (1) that recipients provide and administer evaluation materials in the native language of the student has been deleted as unnecessary, since the same requirement already exists under title VI and is more appropriately covered under that statute. Subparagraphs (1) and (2) are, in general, intended to prevent misinterpretation and similar misuse of test scores and, in particular, to avoid undue reliance on general intelligence tests. Subparagraph (3) requires a recipient to administer tests to a student with impaired sensory, manual, or speaking skills in whatever manner is necessary to avoid distortion of the test results by the impairment. Former subparagraph (4) has been deleted as unnecessarily repetitive of the other provisions of this paragraph.

Paragraph (c) requires a recipient to draw upon a variety of sources in the evaluation process so that the possibility of error in classification is minimized. In particular, it requires that all significant factors relating to the learning process, including adaptive behavior, be considered. (Adaptive behavior is the effectiveness with which the individual meets the standards of personal independence and social responsibility expected of his or her age and cultural group.) Information from all sources must be documented and considered by a group of persons, and the procedure must ensure that the child is placed in the most integrated setting appropriate.

The proposed regulation would have required a complete individual reevaluation of the student each year. The Department has concluded that it is inappropriate in the section 504 regulation to require full reevaluations on such a rigid schedule. Accordingly, § 84.35(c) requires periodic reevaluations and specifies that reevaluations in accordance with the EHA will constitute compliance. The proposed regulation implementing the EHA allows reevaluation at three-year intervals except under certain specified circumstances.

Under § 84.36, a recipient must establish a system of due process procedures to be afforded to parents or guardians before the recipient takes any action regarding the identification, evaluation, or educational placement of a person who, because of handicap, needs or is believed to need special education or related services. This action has been revised. Because the due process procedures of the EHA, incorporated by reference in the proposed section 504 regulation, are inappropriate for some recipients not subject to that Act, the section now specifies minimum necessary procedures.

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notice a right to inspect records, an impartial hearing with a right to representation by counsel and a review procedure. The EHA procedures remain one means of meeting the regulation's due process requirements however, and are recommended to recipients as a model.

26. *Nonacademic services.* Section 84.37 requires a recipient to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation. Because these services and activities are part of a recipient's education program, they must, in accordance with the provisions of § 84.34, be provided in the most integrated setting appropriate.

Revised paragraph (c)(2) does permit separation or differentiation with respect to the provision of physical education and athletics activities, but only if qualified handicapped students are also allowed the opportunity to compete for regular teams or participate in regular activities. Most handicapped students are able to participate in one or more regular physical education and athletics activities. For example, a student in a wheelchair can participate in regular archery course, as can a deaf student in a wrestling course.

Finally, the one-year transition period provided in former § 84.37(a)(3) was deleted in response to the almost unanimous objection of commenters to that provision.

27. *Preschool and adult education.* Section 84.38 prohibits discrimination on the basis of handicap in preschool and adult education programs. Former paragraph (b), which emphasized that compensatory programs for disadvantaged children are subject to section 504, has been deleted as unnecessary, since it is comprehended by paragraph (a).

28. *Private education.* Section 84.39 sets forth the requirements applicable to recipients that operate private education programs and activities. The obligations of these recipients have been channeled in two significant respects. First, private schools are subject to the evaluation and due process provisions of the subpart only if they operate special education programs. Second, under § 84.39(b), they may charge more for providing services to handicapped students than to nonhandicapped students to the extent that additional charges can be justified by increased costs.

Paragraph (a) of § 84.39 is intended to make clear that recipients that operate private education programs and activities are not required to provide an appropriate education to handicapped students with special educational needs if the recipient does not offer programs designed to meet those needs. Thus, a private school that has no program for mentally retarded persons is neither required to admit such a person into

its program nor to arrange or pay for the provision of the person's education in an other program. A private recipient without a special program for blind students, however, would not be permitted to exclude, on the basis of blindness, a blind applicant who is able to participate in the regular program with minor adjustments in the manner in which the program is normally offered.

SUBPART E—POSTSECONDARY EDUCATION

Subpart E prescribes requirements for nondiscrimination in recruitment, admission, and treatment of students in postsecondary education programs and activities, including vocational education.

29. *Admission and recruitment.* In addition to a general prohibition of discrimination on the basis of handicap in § 84.42(a), the regulation delineates, in § 84.42(b), specific prohibitions concerning the establishment of limitations on admission of handicapped students, the use of tests or selection criteria, and readmission inquiry. Several changes have been made in this provision.

Section 84.42(b) provides that postsecondary educational institutions may not use any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons unless it has been validated as a predictor of academic success and alternate tests or criteria with a less disproportionate, adverse effect are shown by the Department to be available. There are two significant changes in this approach from the July 16 proposed regulation.

First, many commenters expressed concern that § 84.42(b)(2)(ii) could be interpreted to require a "global search" for alternate tests that do not have a disproportionate, adverse impact on handicapped persons. This was not the intent of the provision and, therefore, it has been amended to place the burden on the Director of the Office for Civil Rights, rather than on the recipient, to identify alternate tests.

Second, a new paragraph (d), concerning validity studies, has been added. Under the proposed regulation, overall success in an education program, not just first-year grades, was the criterion against which admissions tests were to be validated. This approach has been changed to reflect the comment of professional testing services that use of first year grades would be less disruptive of present practice and that periodic validity studies against overall success in the education program would be sufficient check on the reliability of first-year grades.

Section 84.42(b)(3) also requires a recipient to assure itself that admissions tests are selected and administered to applicants with impaired sensory, manual, or speaking skills in such manner as is necessary to avoid unfair distortion of test results. Methods have been developed for testing the aptitude and achievement of persons who are

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not able to take written tests or even to make the marks required for mechanically scored objective tests. In addition, methods for testing persons with visual or hearing impairments are available. A recipient, under this paragraph, must assure itself that such methods are used with respect to the selection and administration of any admissions tests that it uses.

Section 84.42(b)(3)(ii) has been amended to require that admissions tests be administered in facilities that, on the whole, are accessible. In this context, "on the whole" means that not all of the facilities need be accessible so long as a sufficient number of facilities are available to handicapped persons.

Revised § 84.42(b)(4) generally prohibits preadmission inquiries as to whether an applicant has a handicap. The considerations that led to this revision are similar to those underlying the comparable revision of § 84.14 on preemployment inquiries. The regulation does, however, allow inquiries to be made, after admission but before enrollment, as to handicaps that may require accommodation.

New paragraph (c) parallels the section on preemployment inquiries and allows postsecondary institutions to inquire about applicants' handicaps before admission, subject to certain safeguards. If the purpose of the inquiry is to take remedial action to correct past discrimination or to take voluntary action to overcome the limited participation of handicapped persons in postsecondary educational institutions.

Proposed § 84.42(c), which would have allowed different admissions criteria in certain cases for handicapped persons, was widely misinterpreted in comments from both handicapped persons and recipients. We have concluded that the section is unnecessary, and it has been deleted.

30. *Treatment of students.* Section 84.43 contains general provisions prohibiting the discriminatory treatment of qualified handicapped applicants. Paragraph (b) requires recipients to ensure that equal opportunities are provided to its handicapped students in education programs and activities that are not operated by the recipient. The recipient must be satisfied that the outside education program or activity as a whole is nondiscriminatory. For example, a college must ensure that discrimination on the basis of handicap does not occur in connection with teaching assignments of student teachers in elementary or secondary schools not operated by the college. Under the "as a whole" wording, the college could continue to use elementary or secondary school systems that discriminate if, and only if, the college's student teaching program, when viewed in its entirety, offered handicapped student teachers the same range and quality

of choice in student teaching assignments afforded nonhandicapped students.

Paragraph (c) of this section prohibits a recipient from excluding qualified handicapped students from any course, course of study, or other part of its education program or activity. This paragraph is designed to eliminate the practice of excluding handicapped persons from specific courses and from areas of concentration because of factors such as ambulatory difficulties of the student or assumptions, by the recipient, that no job would be available in the area in question for a person with that handicap.

New paragraph (d) requires postsecondary institutions to operate their programs and activities so that handicapped students are provided services in the most integrated setting appropriate. Thus, if a college had several elementary physics classes and had moved one such class to the first floor of the science building to accommodate students in wheelchairs, it would be a violation of this paragraph for the college to concentrate handicapped students with no mobility impairments in the same class.

31. *Academic adjustments.* Paragraph (a) of § 84.44 requires that a recipient make certain adjustments to academic requirements and practices that discriminate or have the effect of discriminating on the basis of handicap. This requirement, like its predecessor in the proposed regulation, does not obligate an institution to waive course or other academic requirements. But such institutions must accommodate those requirements to the needs of individual handicapped students. For example, an institution might permit an otherwise qualified handicapped student who is deaf to substitute an art appreciation or music history course for a required course in music appreciation or could modify the manner in which the music appreciation course is conducted for the deaf student. It should be stressed that academic requirements that can be demonstrated by the recipient to be essential to its program of instruction or to particular degrees need not be changed.

Paragraph (b) provides that postsecondary institutions may not impose rules that have the effect of limiting the participation of handicapped students in the education program. Such rules include prohibition of tape recorders or brailers in classrooms and dog guides in campus buildings. Several recipients expressed concern about allowing students to tape record lectures because the professor may later want to copyright the lectures. This problem may be solved by requiring students to sign agreements that they will not release the tape recording or transcription or otherwise hinder the professor's ability to obtain a copyright.

Paragraph (c) of this section, concerning the administration of course examinations to students with impaired sensory, manual,

or speaking skills, parallels the regulation's provisions on admissions testing (§ 84.42(b)) and will be similarly interpreted.

Under § 84.44(d), a recipient must ensure that no handicapped student is subject to discrimination in the recipient's program because of the absence of necessary auxiliary educational aids. Colleges and universities expressed concern about the costs of compliance with this provision.

The Department emphasizes that recipients can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities. In those circumstances where the recipient institution must provide the educational auxiliary aid, the institution has flexibility in choosing the methods by which the aids will be supplied. For example, some universities have used students to work with the institution's handicapped students. Other institutions have used existing private agencies that tape texts for handicapped students free of charge in order to reduce the number of readers needed for visually impaired students.

As long as no handicapped person is excluded from a program because of the lack of an appropriate aid, the recipient need not have all such aids on hand at all times. Thus, readers need not be available in the recipient's library at all times so long as the schedule of times when a reader is available is established, is adhered to, and is sufficient. Of course, recipients are not required to maintain a complete braille library.

32 *Housing* Section 84.45(a) requires postsecondary institutions to provide housing to handicapped students at the same cost as they provide it to other students and in a convenient, accessible, and comparable manner. Commenters, particularly blind persons pointed out that some handicapped persons can live in any college housing and need not wait to the end of the transition period in Subpart C to be offered the same variety and scope of housing accommodations given to nonhandicapped persons. The Department concurs with this position and will interpret this section accordingly.

A number of colleges and universities reacted negatively to paragraph (b) of this section. It provides that, if a recipient assists in making off-campus housing available to its students, it should develop and implement procedures to assure itself that off-campus housing, as a whole, is available to handicapped students. Since postsecondary institutions are presently required to assure themselves that off-campus housing is provided in a manner that does not discriminate on the basis of sex (§ 86.32 of the title

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IX regulation), they may use the procedures developed under title IX in order to comply with § 84.45(b). It should be emphasized that not every off-campus living accommodation need be made accessible to handicapped persons.

33 *Health and insurance* Section 84.46 of the proposed regulation, providing that recipients may not discriminate on the basis of handicap in the provision of health related services, has been deleted as duplicative of the general provisions of section 84.43. This deletion represents no change in the obligation of recipients to provide nondiscriminatory health and insurance plans. The Department will continue to require that nondiscriminatory health services be provided to handicapped students. Recipients are not required, however, to provide specialized services and aids to handicapped persons in health programs. If, for example, a college infirmary treats only simple disorders such as cuts, bruises, and colds, its obligation to handicapped persons is to treat such disorders for them.

34 *Financial assistance* Section 84.46(a) (formerly § 84.47), prohibiting discrimination in providing financial assistance, remains substantively the same. It provides that recipients may not provide less assistance to or limit the eligibility of qualified handicapped persons for such assistance, whether the assistance is provided directly by the recipient or by another entity through the recipient's sponsorship. Awards that are made under wills, trusts, or similar legal instruments in a discriminatory manner are permissible, but only if the overall effect of the recipient's provision of financial assistance is not discriminatory on the basis of handicap.

It will not be considered discriminatory to deny, on the basis of handicap, an athletic scholarship to a handicapped person if the handicap renders the person unable to qualify for the award. For example, a student who has a neurological disorder might be denied a varsity football scholarship on the basis of his inability to play football, but a deaf person could not, on the basis of handicap, be denied a scholarship for the school's diving team. The deaf person could, however, be denied a scholarship on the basis of comparative diving ability.

Commenters on § 84.46(b), which applies to assistance in obtaining outside employment for students, expressed similar concerns to those raised under § 84.43(b), concerning cooperative programs. This paragraph has been changed in the same manner as § 84.43(b) to include the "as a whole" concept and will be interpreted in the same manner as § 84.43(b).

35 *Nonacademic services* Section 84.47 (formerly § 84.48) establishes nondiscrimination standards for physical education and athletics counseling and placement services,

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and social organizations. This section sets the same standards as does § 84.38 of Subpart D, discussed above, and will be interpreted in a similar fashion.

SUBPART F—HEALTH, WELFARE, AND SOCIAL SERVICES

Subpart F applies to recipients that operate health, welfare, and social service programs. The Department received fewer comments on this subpart than on others.

Although many commented that Subpart F lacked specificity, these commenters provided neither concrete suggestions nor additions. Nevertheless, some changes have been made, pursuant to comment, to clarify the obligations of recipients in specific areas. In addition, in an effort to reduce duplication in the regulation, the section governing recipients providing health services (proposed § 84.52) has been consolidated with the section regulating providers of welfare and social services (proposed § 84.53). Since the separate provisions that appeared in the proposed regulation were almost identical, no substantive change should be inferred from their consolidation.

Several commenters asked whether Subpart F applies to vocational rehabilitation agencies whose purpose is to assist in the rehabilitation of handicapped persons. To the extent that such agencies receive financial assistance from the Department, they are covered by Subpart F and all other relevant subparts of the regulation. Nothing in this regulation, however, precludes such agencies from servicing only handicapped persons. Indeed, § 84.4(c) permits recipients to offer services or benefits that are limited by federal law to handicapped persons or classes of handicapped persons.

Many comments suggested requiring state health, welfare, and social service agencies to take an active role in the enforcement of section 504 with regard to local health and social service providers. The Department believes that the possibility for federal-state cooperation in the administration and enforcement of section 504 warrants further consideration. Moreover, the Department will rely largely on state Medicaid agencies, as it has under title VI, for monitoring compliance by individual Medicaid providers.

A number of comments also discussed whether section 504 should be read to require payment of compensation to institutionalized handicapped patients who perform services for the institution in which they reside. The Department of Labor has recently issued a proposed regulation under the Fair Labor Standards Act (FLSA) that covers the question of compensation for institutionalized persons. 42 FR 15224 (March 18, 1977). This Department will seek information and comment from the Department of Labor concerning that agency's experience administering the FLSA regulation.

36 *Health, welfare, and other social service providers*. As already noted, § 84.53 has been combined with proposed § 84.52 into a single section covering health, welfare, and other social services. Section 84.52(a) has been expanded in several respects. The addition of new paragraph (a)(2) is intended to make clear the basic requirement of equal opportunity to receive benefits or services in the health, welfare, and social service areas. The paragraph parallels §§ 84.4(b)(ii) and 84.43(b). New paragraph (a)(3) requires the provision of effective benefits or services, as defined in § 84.4(b)(2) (i.e., benefits or services which "afford handicapped persons equal opportunity to obtain the same result (or) to gain the same benefit . . .").

Section 84.52(a) also includes provisions concerning the limitation of benefits or services to handicapped persons and the subsection of handicapped persons to different eligibility standards. (These provisions were previously included in the welfare recipient section (§ 84.53(a)).) One common misconception about the regulation is that it would require specialized hospitals and other health care providers to treat all handicapped persons. The regulation makes no such requirement. Thus, a burn treatment center need not provide other types of medical treatment to handicapped persons unless it provides such medical services to nonhandicapped persons. It could not, however, refuse to treat the burns of a deaf person because of his or her deafness.

Commenters had raised the question of whether the prohibition against different standards of eligibility might preclude recipients from providing special services to handicapped persons or classes of handicapped persons. The regulation will not be so interpreted, and the specific section in question has been eliminated. Section 84.4(c) makes clear that special programs for handicapped persons are permitted.

A new paragraph (a)(5) concerning the provision of different or separate services or benefits has been added. This provision prohibits such treatment unless necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

Section 84.52(a)(2) of the proposed regulation has been omitted as duplicative of revised § 84.22 (b) and (c) in Subpart C. As discussed above, these sections permit health care providers to arrange to meet patients in accessible facilities and to make referrals in carefully limited circumstances.

Section 84.52(a)(3) of the proposed regulation has been redesignated § 84.52(b) and has been amended to cover written material concerning waivers of rights or consent to treatment as well as general notices concerning health benefits or services. The section requires the recipient to ensure that qualified handicapped persons are not

denied effective notice because of their handicap. For example, recipients could use several different types of notice in order to reach persons with impaired vision or hearing, such as brailled messages, radio spots, and tactile devices on cards or envelopes to inform blind persons of the need to call the recipient for further information.

Sections 84.52(a)(4), 84.52(a)(5), and 84.52(b) have been omitted from the regulation as unnecessary. They are clearly comprehended by the more general sections banning discrimination.

Section 84.52(c) is a new section requiring recipient hospitals to establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care. Although it would be appropriate for a hospital to fulfill its responsibilities under this section by having a full-time interpreter for the deaf on staff, there may be other means of accomplishing the desired result of assuring that some means of communication is immediately available for deaf persons needing emergency treatment.

Section 84.52(d), also a new provision, requires recipients with fifteen or more employees to provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills. Further, the Director may require a small provider to furnish auxiliary aids where the provision of aids would not adversely affect the ability of the recipient to provide its health benefits or service. Thus although a small non-profit neighborhood clinic might not be obligated to have available an interpreter for deaf persons, the Director may require provision of such aids as may be reasonably available to ensure that qualified handicapped persons are not denied appropriate benefits or services because of their handicaps.

37. *Treatment of Drug Addicts and Alcoholics.* Section 84.53 is a new section that prohibits discrimination in the treatment and admission of drug and alcohol addicts to hospitals and outpatient facilities. This section is included pursuant to section 407, Public Law 92-255, the Drug Abuse Office and Treatment Act of 1972 (21 U.S.C. 1174), as amended, and section 321, Public Law 91-616, the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 (42 U.S.C. 4581), as amended, and section 321, Public Law 93-282. Section 504 itself also prohibits such discriminatory treatment and, in addition, prohibits similar discriminatory treatment by other types of health providers. Section 84.53 prohibits discrimination against drug abusers by operators of outpatient facilities, despite the fact that section 407 pertains only to hospitals, because of the broader application of section 504. This provision does not mean that all hospitals and outpatient

facilities must treat drug addiction and alcoholism. It simply means, for example, that a cancer clinic may not refuse to treat cancer patients simply because they are also alcoholics.

38. *Education of institutionalized persons.* The regulation retains § 84.54 of the proposed regulation that requires that an appropriate education be provided to qualified handicapped persons who are confined to residential institutions or day care centers.

SUBPART G—PROCEDURES

In § 84.61, the Secretary has adopted the title VI complaint and enforcement procedures for use in implementing section 504 until such time as they are superseded by the issuance of a consolidated procedural regulation applicable to all of the civil rights statutes and executive orders administered by the Department.

APPENDIX B—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

NOTE.—For the text of these guidelines, see 45 CFR Part 80, Appendix B

[42 FR 22677, May 4, 1977, as amended at 44 FR 17163, Mar. 21, 1979]

Title VI Investigation
and Hearing Procedures
(Used for Section 504 Cases)
45 C.F.R. Parts 80 and 81

§ 80.6 Compliance information.

(a) *Cooperation and assistance.* The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) *Access to sources of information.* Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this

part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information. Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this Part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law.

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the program for which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this regulation. (Sec. 601, 602, Civil Rights Act of 1964: 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17981, 17982, July 5, 1973]

§ 80.7 Conduct of investigations.

(a) *Periodic compliance reviews.* The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.

(c) *Investigations.* The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint,

or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 80.8.

(2) If an investigation does not warrant action pursuant to subparagraph (1) of this paragraph the responsible Department official or his designee will so inform the recipient and the complainant, if any, in writing.

(e) *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

(Sec. 601, 602, Civil Rights Act of 1964: 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1) [29 FR 16298, Dec. 4, 1964, as amended at 38 FR 17981, 17982, July 5, 1973]

§ 80.8 Procedure for effecting compliance.

(a) *General.* If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of

Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and 2) any applicable proceeding under State or local law.

(b) *Noncompliance with § 80.4.* If an applicant fails or refuses to furnish an assurance required under § 80.4 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph except that the Department shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* No order suspending, terminating or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible De-

partment official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1, Sec. 182, 80 Stat. 1209; 42 U.S.C. 2000d-5) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14556, Oct. 19, 1967; 38 FR 17982, July 8, 1973]

§ 80.9 Hearings.

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § 80.8(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the responsible Department official that the matter be scheduled for hearing or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the Act and § 80.8(c) of this regulation and consent to the making of a decision on the basis of such information as may be filed as the record.

(b) *Time and place of hearing.* Hearings shall be held at the offices of the Department in Washington, D.C., at a time fixed by the responsible Department official unless he determines that the

convenience of the applicant or recipient or of the Department requires that another place be selected. Hearings shall be held before a hearing examiner designated in accordance with 5 U.S.C. § 3105 and 3344 (section 11 of the Administrative Procedure Act).

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient and the Department shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.*
(1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with sections 5-8 of the Administrative Procedure Act, and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the applicant or recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing. Any person (other than a Government employee considered to be on official business) who, having been invited or requested to appear and testify as a witness on the Government's behalf, attends at a time and place scheduled for a hearing provided for by this part, may be reimbursed for his travel and actual expenses of attendance in an amount not to exceed the amount payable under the standardized travel regulations to a Government employee traveling on official business.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance

thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(e) *Consolidated or Joint Hearings.* In cases in which the same or related facts are asserted to constitute non-compliance with this regulation with respect to two or more programs to which this part applies, or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued under Title VI of the Act, the responsible Department official may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedures not inconsistent with this part. Final decisions in such cases, insofar as this regulation is concerned, shall be made in accordance with § 80.10.

(Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1) [29 FR 16258, Dec. 4, 1964, as amended at 32 FR 14655, Oct. 29, 1967; 38 FR 17981, 17982, July 5, 1973]

§ 80.10 Decisions and notices.

(a) *Decisions by hearing examiners.* After a hearing is held by a hearing examiner such hearing examiner shall either make an initial decision, if so authorized, or certify the entire record including his recommended findings and proposed decision to the reviewing authority for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient and to the complainant, if any. Where the initial decision referred to in this paragraph or in paragraph (c) of this section is made by the hearing examiner, the applicant or recipient or the counsel for the Department may, within the period provided for in the rules of procedure issued by the responsible Department official, file with the reviewing authority exceptions to the initial decision, with his reasons therefor. Upon the filing of such exceptions the reviewing authority shall review the initial decision and issue its own decision thereon including the reasons therefor. In the absence of exceptions the initial decision shall constitute the final decision, subject to the provisions of paragraph (e) of this section.

(b) *Decisions on record or review by the reviewing authority.* Whenever a record is certified to the reviewing authority for decision or it reviews the decision of

a hearing examiner pursuant to paragraph (a) or (c) of this section, the applicant or recipient shall be given reasonable opportunity to file with it briefs or other written statements of its contentions, and a copy of the final decision of the reviewing authority shall be given in writing to the applicant or recipient and to the complainant, if any.

(c) *Decisions on record where a hearing is waived.* Whenever a hearing is waived pursuant to § 80.9(a) the reviewing authority shall make its final decision on the record or refer the matter to a hearing examiner for an initial decision to be made on the record. A copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required.* Each decision of a hearing examiner or reviewing authority shall set forth a ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(e) *Review in certain cases by the Secretary.* If the Secretary has not personally made the final decision referred to in paragraphs (a), (b), or (c) of this section, a recipient or applicant or the counsel for the Department may request the Secretary to review a decision of the Reviewing Authority in accordance with rules of procedure issued by the responsible Department official. Such review is not a matter of right and shall be granted only where the Secretary determines there are special and important reasons therefor. The Secretary may grant or deny such request, in whole or in part. He may also review such a decision upon his own motion in accordance with rules of procedure issued by the responsible Department official. In the absence of a review under this paragraph, a final decision referred to in paragraphs (a), (b), (c) of this section shall become the final decision of the Department when the Secretary transmits it as such to Congressional committees with the report required under section 602 of the Act. Failure of an applicant or recipient to file an exception with the Reviewing Authority or to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

(f) *Content of orders.* The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, to which this regulation applies, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and this regulation, including provisions designed to assure that no Federal financial assistance to which this regulation applies will thereafter be extended under such law or laws to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to this regulation, or to have otherwise failed to comply with this regulation unless and until it corrects its noncompliance and satisfies the responsible Department official that it will fully comply with this regulation.

(g) *Post-termination proceedings.* (1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this part and provides reasonable assurance that it will fully comply with this part. An elementary or secondary school or school system which is unable to file an assurance of compliance with § 80.3 shall be restored to full eligibility to receive Federal financial assistance, if it files a court order or a plan for desegregation which meets the requirements of § 80.4(c), and provides reasonable assurance that it will comply with the court order or plan.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (f) of this section may at any time request the responsible Department official to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of subparagraph (1) of this paragraph. If the responsible Department official determines that those requirements have been satisfied, he shall restore such eligibility.

(3) If the responsible Department official denies any such request, the applicant or recipient may submit a request for a hearing in writing, specifying why it believes such official to have been in error. It shall thereupon be given an

expeditious hearing, with a decision on the record, in accordance with rules of procedure issued by the responsible Department official. The applicant or recipient will be restored to such eligibility if it proves at such hearing that it satisfied the requirements of subparagraph (1) of this paragraph. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (f) of this section shall remain in effect.

(Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 11555, Oct. 19, 1967; 38 FR 17981, 17982, July 5, 1973]

§ 80.11 Judicial review.

Action taken pursuant to section 602 of the Act is subject to judicial review as provided in section 603 of the Act.

(Sec. 603, 78 Stat. 253; 42 U.S.C. 2000d-2) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 11555, Oct. 19, 1967]

§ 80.12 Effect on other regulations, forms and instructions.

(a) *Effect on other regulations.* All regulations, orders, or like directions heretofore issued by any officer of the Department which impose requirements designed to prohibit any discrimination against individuals on the ground of race, color, or national origin under any program to which this regulation applies, and which authorize the suspension or termination of or refusal to grant or to continue Federal financial assistance to any applicant for or recipient of assistance for failure to comply with such requirements, are hereby superseded to the extent that such discrimination is prohibited by this regulation, except that nothing in this regulation shall be deemed to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction, or like direction prior to the effective date of this regulation. Nothing in this regulation, however, shall be deemed to supersede any of the following (including future amendments thereof): (1) The "Standards for a Merit System of Personnel Administration," issued jointly by the Secretaries of Defense, of Health, Education and Welfare, and of Labor; 45 CFR Part 70; (2) Executive Order 11063 and regulations issued thereunder, or any other regulations or instructions, insofar as such Order, regulations, or instructions prohibit discrimination on the ground of race, color, or national origin in any program or

situation to which this regulation is inapplicable, or prohibit discrimination on any other ground; or (3) requirements for Emergency School Assistance as published in 35 FR 13442 and codified as 45 CFR Part 181.

(b) *Forms and instructions.* The responsible Department official shall issue and promptly make available to interested persons forms and detailed instructions and procedures for effectuating this part.

(c) *Supervision and coordination.* The responsible Department official may from time to time assign to officials of the Department, or to officials of other departments or agencies of the Government with the consent of such departments or agencies, responsibilities in connection with the effectuation of the purposes of Title VI of the Act and this regulation (other than responsibility for review as provided in § 80.10(e)), including the achievements of effective coordination and maximum uniformity within the Department and within the Executive Branch of the Government in the application of Title VI and this regulation to similar programs and in similar situations. Any action taken, determination made, or requirement imposed by an official of another Department or Agency acting pursuant to an assignment of responsibility under this subsection shall have the same effect as though such action had been taken by the responsible official of this Department.

(Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 11555, Oct. 19, 1967; 38 FR 17981, 17982, July 5, 1973]

§ 80.13 Definitions.

As used in this part—

(a) The term "Department" means the Department of Health, Education, and Welfare, and includes each of its operating agencies and other organizational units.

(b) The term "Secretary" means the Secretary of Health, Education, and Welfare.

(c) The term "responsible Department official" means the Secretary or, to the extent of any delegation by the Secretary of authority to act in his stead under any one or more provisions of this part, any person or persons to whom the Secretary has heretofore delegated, or to whom the Secretary may hereafter delegate such authority.

(d) The term "reviewing authority" means the Secretary, or any person or persons (including a board or other body specially created for that purpose and also including the responsible Department official) acting pursuant to authority delegated by the Secretary to carry out responsibilities under § 80.10 (a)-(d).

(e) The term "United States" means the States of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and the territories and possessions of the United States, and the term "State" means any one of the foregoing.

(f) The term "Federal financial assistance" includes (1) grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permit for use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(g) The term "program" includes any program, project, or activity for the provision of services, financial aid, or other benefits to individuals (including education or training, health, welfare, rehabilitation, housing, or other services, whether provided through employees of the recipient of Federal financial assistance or provided by others through contracts or other arrangements with the recipient, and including work opportunities and cash or loan or other assistance to individuals), or for the provision of facilities for furnishing services, financial aid or other benefits to individuals. The services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any services, financial aid, or other benefits provided with the aid of Federal financial assistance or with the aid of any non-Federal funds, property, or other resources required to be expended or made available for the program to meet matching requirements or other conditions which must be met in order to receive the Federal financial assistance and to include any services,

financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance or such non-Federal resources.

(h) The term "facility" includes all or any portion of structures, equipment, or other real or personal property or interests therein, and the provision of facilities includes the construction, expansion, renovation, remodeling, alteration or acquisition of facilities.

(i) The term "recipient" means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program.

(j) The term "primary recipient" means any recipient which is authorized or required to extend Federal financial assistance to another recipient for the purpose of carrying out a program.

(k) The term "applicant" means one who submits an application, request, or plan required to be approved by a Department official, or by a primary recipient, as a condition to eligibility for Federal financial assistance, and the term "application" means such an application, request, or plan.

(Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17082, July 5, 1973]

Title 45—Public Welfare

PART 81—PRACTICE AND PROCEDURE FOR HEARINGS UNDER PART 80 OF THIS TITLE

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 §1.116 Filing of ex parte communications.

Subpart L—Posttermination Proceedings

- §1.121 Posttermination proceedings.

Subpart M—Definitions

- §1.131 Definitions.

AUTHORITY: The provisions of this Part 81 are issued under 5 U.S.C. 301 and 45 CFR 80.9(d).

SOURCE: The provisions of this Part 81 appear at 32 F.R. 16155, Nov. 2, 1967, unless otherwise noted.

Subpart A—General Information

§ 81.1 Scope of rules.

The rules of procedure in this part supplement §§ 80.9 and 80.10 of this subtitle and govern the practice for hearings, decisions, and administrative review conducted by the Department of Health, Education, and Welfare, pursuant to Title VI of the Civil Rights Act of 1964 (sec. 602, 78 Stat. 252) and Part 80 of this subtitle.

§ 81.2 Records to be public.

All pleadings, correspondence, exhibits, transcripts of testimony, exceptions, briefs, decisions, and other documents filed in the docket in any proceeding may be inspected and copied in the office of the Civil Rights hearing clerk. Inquiries may be made at the Central Information Center, Department of Health, Education, and Welfare, 330 Independence Avenue SW., Washington, D.C. 20201.

§ 81.3 Use of gender and number.

As used in this part, words importing the singular number may extend and be applied to several persons or things, and vice versa. Words importing the masculine gender may be applied to females or organizations.

§ 81.4 Suspension of rules.

Upon notice to all parties, the reviewing authority or the presiding officer, with respect to matters pending before them, may modify or waive any rule in this part upon determination that no party will be unduly prejudiced and the ends of justice will thereby be served.

Subpart B—Appearance and Practice

§ 81.11 Appearance.

A party may appear in person or by counsel and participate fully in any proceeding. A State agency or a corporation may appear by any of its officers or by any employee it authorizes to appear on its behalf. Counsel must be members in good standing of the bar of a State, Territory, or possession of the United States or of the District of Columbia or the Commonwealth of Puerto Rico.

§ 81.12 Authority for representation.

Any individual acting in a representative capacity in any proceeding may be required to show his authority to act in such capacity.

§ 81.13 Exclusion from hearing for misconduct.

Disrespectful, disorderly, or contumacious language or contemptuous conduct, refusal to comply with directions, or continued use of dilatory tactics by any person at any hearing before a presiding officer shall constitute grounds for immediate exclusion of such person from the hearing by the presiding officer.

Subpart C—Parties

§ 81.21 Parties; General Counsel deemed a party.

(a) The term party shall include an applicant or recipient or other person to whom a notice of hearing or opportunity for hearing has been mailed naming him as respondent.

(b) The General Counsel of the Department of Health, Education, and Welfare shall be deemed a party to all proceedings.

§ 81.22 Amici curiae.

(a) Any interested person or organization may file a petition to participate in a proceeding as an amicus curiae. Such petition shall be filed prior to the pre-hearing conference, or if none is held, before the commencement of the hearing, unless the petitioner shows good cause for filing the petition later. The presiding officer may grant the petition if he finds that the petitioner has a legitimate interest in the proceedings, that such participation will not unduly delay the outcome, and may contribute materially to the proper disposition thereof. An amicus curiae is not a party and may not introduce evidence at a hearing.

(b) An amicus curiae may submit a statement of position to the presiding officer prior to the beginning of a hearing, and shall serve a copy on each party. The amicus curiae may submit a brief on each occasion a decision is to be made or a prior decision is subject to review. His brief shall be filed and served on each party within the time limits applicable to the party whose position he deems himself to support; or if he does not deem himself to support the position of any party, within the longest time limit applicable to any party at that particular stage of the proceedings.

(c) When all parties have completed their initial examination of a witness, any amicus curiae may request the presiding officer to propound specific questions to the witness. The presiding officer, in his discretion, may grant any such request if he believes the proposed additional testimony may assist materially in elucidating factual matters at issue between the parties and will not expand the issues.

§ 81.23 Complainants not parties.

A person submitting a complaint pursuant to § 80.7(b) of this title is not a party to the proceedings governed by this part, but may petition, after proceedings are initiated, to become an amicus curiae.

Subpart D—Form, Execution, Service and Filing of Documents

§ 81.31 Form of documents to be filed.

Documents to be filed under the rules in this part shall be dated, the original signed in ink, shall show the docket description and title of the proceeding, and shall show the title, if any, and address

of the signatory. Copies need not be signed but the name of the person signing the original shall be reproduced. Documents shall be legible and shall not be more than 8½ inches wide and 12 inches long.

§ 81.32 Signature of documents.

The signature of a party, authorized officer, employee or attorney constitutes a certificate that he has read the document, that to the best of his knowledge, information, and belief there is good ground to support it, and that it is not introduced for delay. If a document is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the proceeding may proceed as though the document had not been filed. Similar action may be taken if scandalous or indecent matter is inserted.

§ 81.33 Filing and service.

All notices by a Department official, and all written motions, requests, petitions, memoranda, pleadings, exceptions, briefs, decisions, and correspondence to a Department official from a party, or vice versa, relating to a proceeding after its commencement shall be filed and served on all parties. Parties shall supply the original and two copies of documents submitted for filing. Filings shall be made with the Civil Rights hearing clerk at the address stated in the notice of hearing or notice of opportunity for hearing, during regular business hours. Regular business hours are every Monday through Friday (legal holidays in the District of Columbia excepted) from 9 a.m. to 5:30 p.m., eastern standard or daylight saving time, whichever is effective in the District of Columbia at the time. Originals only of exhibits and transcripts of testimony need be filed. For requirements of service on amici-curiae, see § 81.107.

§ 81.34 Service—how made.

Service shall be made by personal delivery of one copy to each person to be served or by mailing by first-class mail, properly addressed with postage prepaid. When a party or amicus has appeared by attorney or other representative, service upon such attorney or representative will be deemed service upon the party or amicus. Documents served by mail preferably should be mailed in sufficient time to reach the addressee by the date on which the original is due to

be filed, and should be air mailed if the addressee is more than 300 miles distant.

§ 81.35 Date of service.

The date of service shall be the day when the matter is deposited in the U.S. mail or is delivered in person, except that the date of service of the initial notice of hearing or opportunity for hearing shall be the date of its delivery, or of its attempted delivery if refused.

§ 81.36 Certificate of service.

The original of every document filed and required to be served upon parties to a proceeding shall be endorsed with a certificate of service signed by the party making service or by his attorney or representative, stating that such service has been made, the date of service, and the manner of service, whether by mail or personal delivery.

Subpart E—Time

§ 81.41 Computation.

In computing any period of time under the rules in this part or in an order issued hereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed in the District of Columbia, in which event it includes the next following business day. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation.

§ 81.42 Extension of time or postponement.

Requests for extension of time should be served on all parties and should set forth the reasons for the application. Applications may be granted upon a showing of good cause by the applicant. From the designation of a presiding officer until the issuance of his decision such requests should be addressed to him. Answers to such requests are permitted, if made promptly.

§ 81.43 Reduction of time to file documents.

For good cause, the reviewing authority or the presiding officer, with respect to matters pending before them, may reduce any time limit prescribed by the rules in this part, except as provided by law or in Part 80 of this title.

Subpart F—Proceedings Prior to Hearing

§ 81.51 Notice of hearing or opportunity for hearing.

Proceedings are commenced by mailing a notice of hearing or opportunity for hearing to an affected applicant or recipient, pursuant to § 80.9 of this title.

§ 81.52 Answer to notice.

The respondent, applicant or recipient may file an answer to the notice within 20 days after service thereof. Answers shall admit or deny specifically and in detail each allegation of the notice, unless the respondent party is without knowledge, in which case his answer should so state, and the statement will be deemed a denial. Allegations of fact in the notice not denied or controverted by answer shall be deemed admitted. Matters alleged as affirmative defenses shall be separately stated and numbered. Failure of the respondent to file an answer within the 20-day period following service of the notice may be deemed an admission of all matters of fact recited in the notice.

§ 81.53 Amendment of notice or answer.

The General Counsel may amend the notice of hearing or opportunity for hearing once as a matter of course before an answer thereto is served, and each respondent may amend his answer once as a matter of course not later than 10 days before the date fixed for hearing but in no event later than 20 days from the date of service of his original answer. Otherwise a notice or answer may be amended only by leave of the presiding officer. A respondent shall file his answer to an amended notice within the time remaining for filing the answer to the original notice or within 10 days after service of the amended notice, whichever period may be the longer, unless the presiding officer otherwise orders.

§ 81.54 Request for hearing.

Within 20 days after service of a notice of opportunity for hearing which does not fix a date for hearing the respondent, either in his answer or in a separate document, may request a hearing. Failure of the respondent to request a hearing shall be deemed a waiver of the right to a hearing and to constitute his consent to the making of a decision on the basis of such information as is available.

§ 81.55

§ 81.55 Consolidation.

The responsible Department official may provide for proceedings in the Department to be joined or consolidated for hearing with proceedings in other Federal departments or agencies, by agreement with such other departments or agencies. All parties to any proceeding consolidated subsequently to service of the notice of hearing or opportunity for hearing shall be promptly served with notice of such consolidation.

§ 81.56 Motions.

Motions and petitions shall state the relief sought, the authority relied upon, and the facts alleged. If made before or after the hearing, these matters shall be in writing. If made at the hearing, they may be stated orally; but the presiding officer may require that they be reduced to writing and filed and served on all parties in the same manner as a formal motion. Motions, answers, and replies shall be addressed to the presiding officer, if the case is pending before him. A repetitious motion will not be entertained.

§ 81.57 Responses to motions and petitions.

Within 8 days after a written motion or petition is served, or such other period as the reviewing authority or the presiding officer may fix, any party may file a response thereto. An immediate oral response may be made to an oral motion.

§ 81.58 Disposition of motions and petitions.

The reviewing authority or the presiding officer may not sustain or grant a written motion or petition prior to expiration of the time for filing responses thereto, but may overrule or deny such motion or petition without awaiting response: *Provided, however*, That pre-hearing conferences, hearings and decisions need not be delayed pending disposition of motions or petitions. Oral motions and petitions may be ruled on immediately. Motions and petitions submitted to the reviewing authority or the presiding officer, respectively, and not disposed of in separate rulings or in their respective decisions will be deemed denied. Oral arguments shall not be held on written motions or petitions unless the presiding officer in his discretion expressly so orders.

Subpart G—Responsibilities and Duties of Presiding Officer

§ 81.61 Who presides.

A hearing examiner assigned under 5 U.S.C. 3165 or 3344 (formerly sec. 11 of the Administrative Procedure Act) shall preside over the taking of evidence in any hearing to which these rules of procedure apply.

§ 81.62 Designation of hearing examiner.

The designation of the hearing examiner as presiding officer shall be in writing, and shall specify whether the examiner is to make an initial decision or to certify the entire record including his recommended findings and proposed decision to the reviewing authority, and may also fix the time and place of hearing. A copy of such order shall be served on all parties. After service of an order designating a hearing examiner to preside, and until such examiner makes his decision, motions and petitions shall be submitted to him. In the case of the death, illness, disqualification or unavailability of the designated hearing examiner, another hearing examiner may be designated to take his place.

§ 81.63 Authority of presiding officer.

The presiding officer shall have the duty to conduct a fair hearing, to take all necessary action to avoid delay, and to maintain order. He shall have all powers necessary to these ends, including (but not limited to) the power to:

(a) Arrange and issue notice of the date, time, and place of hearings, or, upon due notice to the parties, to change the date, time, and place of hearings previously set.

(b) Hold conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding.

(c) Require parties and amici curiae to state their position with respect to the various issues in the proceeding.

(d) Administer oaths and affirmations.

(e) Rule on motions and other procedural items on matters pending before him.

(f) Regulate the course of the hearing and conduct of counsel therein.

(g) Examine witnesses and direct witnesses to testify.

(h) Receive, rule on, exclude or limit evidence.

(i) Fix the time for filing motions, petitions, briefs, or other items in matters pending before him.

(j) Issue initial or recommended decisions.

(k) Take any action authorized by the rules in this part or in conformance with the provisions of 5 U.S.C. 551-559 (the Administrative Procedure Act).

Subpart H—Hearing Procedures

§ 81.71 Statement of position and trial briefs.

The presiding officer may require parties and amici curiae to file written statements of position prior to the beginning of a hearing. The presiding officer may also require the parties to submit trial briefs.

§ 81.72 Evidentiary purpose.

(a) The hearing is directed to receiving factual evidence and expert opinion testimony related to the issues in the proceeding. Argument will not be received in evidence; rather it should be presented in statements, memoranda, or briefs, as determined by the presiding officer. Brief opening statements, which shall be limited to statement of the party's position and what he intends to prove, may be made at hearings.

(b) Hearings for the reception of evidence will be held only in cases where issues of fact must be resolved in order to determine whether the respondent has failed to comply with one or more applicable requirements of Part 89 of this title. In any case where it appears from the respondent's answer to the notice of hearing or opportunity for hearing, from his failure timely to answer, or from his admissions or stipulations in the record, that there are no matters of material fact in dispute, the reviewing authority or presiding officer may enter an order so finding, vacating the hearing date if one has been set, and fixing the time for filing briefs under § 81.101. Thereafter the proceedings shall go to conclusion in accordance with Subpart J of this part. The presiding officer may allow an appeal from such order in accordance with § 81.86.

§ 81.73 Testimony.

Testimony shall be given orally under oath or affirmation by witnesses at the hearing; but the presiding officer, in his discretion, may require or permit that

the direct testimony of any witness be prepared in writing and served on all parties in advance of the hearing. Such testimony may be adopted by the witness at the hearing, and filed as part of the record thereof. Unless authorized by the presiding officer, witnesses will not be permitted to read prepared testimony into the record. Except as provided in §§ 81.75 and 81.76, witnesses shall be available at the hearing for cross-examination.

§ 81.74 Exhibits.

Proposed exhibits shall be exchanged at the prehearing conference, or otherwise prior to the hearing if the presiding officer so requires. Proposed exhibits not so exchanged may be denied admission as evidence. The authenticity of all proposed exhibits exchanged prior to hearing will be deemed admitted unless written objection thereto is filed prior to the hearing or unless good cause is shown at the hearing for failure to file such written objection.

§ 81.75 Affidavits.

An affidavit is not inadmissible as such. Unless the presiding officer fixes other time periods affidavits shall be filed and served on the parties not later than 15 days prior to the hearing; and not less than 7 days prior to hearing a party may file and serve written objection to any affidavit on the ground that he believes it necessary to test the truth of assertions therein at hearing. In such event the assertions objected to will not be received in evidence unless the affiant is made available for cross-examination, or the presiding officer determines that cross-examination is not necessary for the full and true disclosure of facts referred to in such assertions. Notwithstanding any objection, however, affidavits may be considered in the case of any respondent who waives a hearing.

§ 81.76 Depositions.

Upon such terms as may be just, for the convenience of the parties or of the Department, the presiding officer may authorize or direct the testimony of any witness to be taken by deposition.

§ 81.77 Admissions as to facts and documents.

Not later than 15 days prior to the scheduled date of the hearing except for good cause shown, or prior to such earlier date as the presiding officer may order, any party may serve upon an opposing

§ 81.78

party a written request for the admission of the genuineness and authenticity of any relevant documents described in and exhibited with the request, or for the admission of the truth of any relevant matters of fact stated in the request. Each of the matters of which an admission is requested shall be deemed admitted, unless within a period designated in the request (not less than 10 days after service thereof, or within such further time as the presiding officer or the reviewing authority if no presiding officer has yet been designated may allow upon motion and notice) the party to whom the request is directed serves upon the requesting party a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny such matters. Copies of requests for admission and answers thereto shall be served on all parties. Any admission made by a party to such request is only for the purposes of the pending proceeding, or any proceeding or action instituted for the enforcement of any order entered therein, and shall not constitute an admission by him for any other purpose or be used against him in any other proceeding or action.

§ 81.78 Evidence.

Irrelevant, immaterial, unreliable, and unduly repetitious evidence will be excluded.

§ 81.79 Cross-examination.

A witness may be cross-examined on any matter material to the proceeding without regard to the scope of his direct examination.

§ 81.80 Unsponsored written material.

Letters expressing views or urging action and other unsponsored written material regarding matters in issue in a hearing will be placed in the correspondence section of the docket of the proceeding. These data are not deemed part of the evidence or record in the hearing.

§ 81.81 Objections.

Objections to evidence shall be timely and briefly state the ground relied upon.

§ 81.82 Exceptions to rulings of presiding officer unnecessary.

Exceptions to rulings of the presiding officer are unnecessary. It is sufficient that a party, at the time the ruling of

the presiding officer is sought, makes known the action which he desires the presiding officer to take, or his objection to an action taken, and his grounds therefor.

§ 81.83 Official notice.

Where official notice is taken or is to be taken of a material fact not appearing in the evidence of record, any party, on timely request, shall be afforded an opportunity to show the contrary.

§ 81.84 Public document items.

Whenever there is offered (in whole or in part) a public document, such as an official report, decision, opinion, or published scientific or economic statistical data issued by any of the executive departments (or their subdivisions), legislative agencies or committees, or administrative agencies of the Federal Government (including Government-owned corporations), or a similar document issued by a State or its agencies, and such document (or part thereof) has been shown by the offeror to be reasonably available to the public, such document need not be produced or marked for identification, but may be offered for official notice, as a public document item by specifying the document or relevant part thereof.

§ 81.85 Offer of proof.

An offer of proof made in connection with an objection taken to any ruling of the presiding officer rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony; and, if the excluded evidence consists of evidence in documentary or written form or of reference to documents or records, a copy of such evidence shall be marked for identification and shall accompany the record as the offer of proof.

§ 81.86 Appeals from ruling of presiding officer.

Rulings of the presiding officer may not be appealed to the reviewing authority prior to his consideration of the entire proceeding except with the consent of the presiding officer and where he certifies on the record or in writing that the allowance of an interlocutory appeal is clearly necessary to prevent exceptional delay, expense, or prejudice to any party, or substantial detriment to the public interest. If an appeal is allowed,

any party may file a brief with the reviewing authority within such period as the presiding officer directs. No oral argument will be heard unless the reviewing authority directs otherwise. At any time prior to submission of the proceeding to it for decision, the reviewing authority may direct the presiding officer to certify any question or the entire record to it for decision. Where the entire record is so certified, the presiding officer shall recommend a decision.

Subpart I—The Record

§ 81.91 Official transcript.

The Department will designate the official reporter for all hearings. The official transcripts of testimony taken, together with any exhibits, briefs, or memoranda of law filed therewith shall be filed with the Department. Transcripts of testimony in hearings may be obtained from the official reporter by the parties and the public at rates not to exceed the maximum rates fixed by the contract between the Department and the reporter. Upon notice to all parties, the presiding officer may authorize corrections to the transcript which involve matters of substance.

§ 81.92 Record for decision.

The transcript of testimony, exhibits, and all papers and requests filed in the proceedings, except the correspondence section of the docket, including rulings and any recommended or initial decision shall constitute the exclusive record for decision.

Subpart J—Posthearing Procedures, Decisions

§ 81.101 Posthearing briefs: proposed findings and conclusions.

(a) The presiding officer shall fix the time for filing posthearing briefs, which may contain proposed findings of fact and conclusions of law, and, if permitted, reply briefs.

(b) Briefs should include a summary of the evidence relied upon together with references to exhibit numbers and pages of the transcript, with citations of the authorities relied upon.

§ 81.102 Decisions following hearing.

When the time for submission of posthearing briefs has expired, the presiding officer shall certify the entire record, including his recommended findings and proposed decision, to the responsible De-

partment official; or if so authorized he shall make an initial decision. A copy of the recommended findings and proposed decision, or of the initial decision, shall be served upon all parties, and amici, if any.

§ 81.103 Exceptions to initial or recommended decisions.

Within 20 days after the mailing of an initial or recommended decision, any party may file exceptions to the decision, stating reasons therefor, with the reviewing authority. Any other party may file a response thereto within 30 days after the mailing of the decision. Upon the filing of such exceptions, the reviewing authority shall review the decision and issue its own decision thereon.

§ 81.104 Final decisions.

(a) Where the hearing is conducted by a hearing examiner who makes an initial decision, if no exceptions thereto are filed within the 20-day period specified in § 81.103, such decision shall become the final decision of the Department, and shall constitute "final agency action" within the meaning of 5 U.S.C. 704 (formerly section 10(c) of the Administrative Procedure Act), subject to the provisions of § 81.106.

(b) Where the hearing is conducted by a hearing examiner who makes a recommended decision, or upon the filing of exceptions to a hearing examiner's initial decision, the reviewing authority shall review the recommended or initial decision and shall issue its own decision thereon, which shall become the final decision of the Department, and shall constitute "final agency action" within the meaning of 5 U.S.C. 704 (formerly section 10(c) of the Administrative Procedure Act), subject to the provisions of § 81.106.

(c) All final decisions shall be promptly served on all parties, and amici, if any.

§ 81.105 Oral argument to the reviewing authority.

(a) If any party desires to argue a case orally on exceptions or replies to exceptions to an initial or recommended decision, he shall make such request in writing. The reviewing authority may grant or deny such requests in its discretion. If granted, it will serve notice of oral argument on all parties. The notice will set forth the order of presentation, the amount of time allotted, and the time and place for argument.

The names of persons who will argue should be filed with the Department hearing clerk not later than 7 days before the date set for oral argument.

(b) The purpose of oral argument is to emphasize and clarify the written argument in the briefs. Reading at length from the brief or other texts is not favored. Participants should confine their arguments to points of controlling importance and to points upon which exceptions have been filed. Consolidations of appearances at oral argument by parties taking the same side will permit the parties' interests to be presented more effectively in the time allotted.

(c) Pamphlets, charts, and other written material may be presented at oral argument only if such material is limited to facts already in the record and is served on all parties and filed with the Department hearing clerk at least 7 days before the argument.

§ 81.106 Review by the Secretary.

Within 20 days after an initial decision becomes a final decision pursuant to § 81.104(a) or within 20 days of the making of a final decision referred to in § 81.104(b), as the case may be, a party may request the Secretary to review the final decision. The Secretary may grant or deny such request, in whole or in part, or serve notice of his intent to review the decision in whole or in part upon his own motion. If the Secretary grants the requested review, or if he serves notice of intent to review upon his own motion, each party to the decision shall have 20 days following notice of the Secretary's proposed action within which to file exceptions to the decision and supporting briefs and memoranda, or briefs and memoranda in support of the decision. Failure of a party to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

§ 81.107 Service on amici curiae.

All briefs, exceptions, memoranda, requests, and decisions referred to in this subpart J shall be served upon amici curiae at the same times and in the same manner required for service on parties. Any written statements of position and trial briefs required of parties under § 81.71 shall be served on amici.

Subpart K—Judicial Standards of Practice

§ 81.111 Conduct.

Parties and their representatives are expected to conduct themselves with honor and dignity and observe judicial standards of practice and ethics in all proceedings. They should not indulge in offensive personalities, unseemly wrangling, or intemperate accusations or characterizations. A representative of any party whether or not a lawyer shall observe the traditional responsibilities of lawyers as officers of the court and use his best efforts to restrain his client from improprieties in connection with a proceeding.

§ 81.112 Improper conduct.

With respect to any proceeding it is improper for any interested person to attempt to sway the judgment of the reviewing authority by undertaking to bring pressure or influence to bear upon any officer having a responsibility for a decision in the proceeding, or his decisional staff. It is improper that such interested persons or any members of the Department's staff or the presiding officer give statements to communications media, by paid advertisement or otherwise, designed to influence the judgment of any officer having a responsibility for a decision in the proceeding, or his decisional staff. It is improper for any person to solicit communications to any such officer, or his decisional staff, other than proper communications by parties or amici curiae.

§ 81.113 Ex parte communications.

Only persons employed by or assigned to work with the reviewing authority who perform no investigative or prosecuting function in connection with a proceeding shall communicate ex parte with the reviewing authority, or the presiding officer, or any employee or person involved in the decisional process in such proceedings with respect to the merits of that or a factually related proceeding. The reviewing authority, the presiding officer, or any employee or person involved in the decisional process of a proceeding shall communicate ex parte with respect to the merits of that or a factually related proceeding only with persons employed by or assigned to work with them and who perform no investigative or prosecuting function.

ecuting function in connection with the proceeding.

§ 81.114 Expeditious treatment.

Requests for expeditious treatment of matters pending before the responsible Department official or the presiding officer are deemed communications on the merits, and are improper except when forwarded from parties to a proceeding and served upon all other parties thereto. Such communications should be in the form of a motion.

§ 81.115 Matters not prohibited.

A request for information which merely inquires about the status of a proceeding without discussing issues or expressing points of view is not deemed an ex parte communication. Such requests should be directed to the Civil Rights hearing clerk. Communications with respect to minor procedural matters or inquiries or emergency requests for extensions of time are not deemed ex parte communications prohibited by § 81.113. Where feasible, however, such communications should be by letter with copies to all parties. Ex parte communications between a respondent and the responsible Department official or the Secretary with respect to securing such respondent's voluntary compliance with any requirement of Part 80 of this title are not prohibited.

§ 81.116 Filing of ex parte communications.

A prohibited communication in writing received by the Secretary, the reviewing authority, or by the presiding officer, shall be made public by placing it in the correspondence file of the docket in the case and will not be considered as part of the record for decision. If the prohibited communication is received orally, a memorandum setting forth its substance shall be made and filed in the correspondence section of the docket in the case. A person referred to in such memorandum may file a comment for inclusion in the docket if he considers the memorandum to be incorrect.

Subpart L—Posttermination Proceedings

§ 81.121 Posttermination proceedings.

(a) An applicant or recipient adversely affected by the order terminating, discontinuing, or refusing Federal finan-

cial assistance in consequence of proceedings pursuant to this title may request the responsible Department official for an order authorizing payment, or permitting resumption, of Federal financial assistance. Such request shall be in writing and shall affirmatively show that since entry of the order, it has brought its program or activity into compliance with the requirements of the Act, and with the Regulation thereunder, and shall set forth specifically, and in detail, the steps which it has taken to achieve such compliance. If the responsible Department official denies such request the applicant or recipient shall be given an expeditious hearing if it so requests in writing and specifies why it believes the responsible Department official to have been in error. The request for such a hearing shall be addressed to the responsible Department official and shall be made within 30 days after the applicant or recipient is informed that the responsible Department official has refused to authorize payment or permit resumption of Federal financial assistance.

(b) In the event that a hearing shall be requested, pursuant to subparagraph (a) of this section, the hearing procedures established by this part shall be applicable to the proceedings, except as otherwise provided in this section.

Subpart M—Definitions

§ 81.131 Definitions.

The definitions contained in § 80.13 of this subtitle apply to this part, unless the context otherwise requires, and the term "reviewing authority" as used herein includes the Secretary of Health, Education, and Welfare, with respect to action by that official under § 81.106.

Transition provisions: (a) The amendments herein shall become effective upon publication in the FEDERAL REGISTER.

(b) These rules shall apply to any proceeding or part thereof to which Part 80 of this title as amended effective October 19, 1967 (published in the FEDERAL REGISTER for Oct. 19, 1967), and as the same may be hereafter amended, applies. In the case of any proceeding or part thereof governed by the provisions of Part 80 as that part existed prior to such amendment, the rules in this Part 81 shall apply as if these amendments were not in effect.

DEPARTMENT OF EDUCATION POLICY
INTERPRETATION UNDER P.L. 94-142:
INDIVIDUALIZED EDUCATION
PROGRAM (IEP) REQUIREMENTS

46 FEDERAL REGISTER 5460 (JANUARY 19, 1981)

A "hold" on this policy interpretation has been issued by the Reagan Administration, so that the Administration may review the policy interpretation to analyze regulatory burdens and to identify opportunities for de-regulation and possible alternative approaches to achieving program objectives. See 46 FEDERAL REGISTER 19000 (March 27, 1981).

DEPARTMENT OF EDUCATION

Office of Special Education

34 CFR Part 300

Assistance to States for Education of Handicapped Children; Interpretation

AGENCY: Department of Education.

ACTION: Notice of interpretation.

SUMMARY: The Secretary of Education issues an interpretation of the individualized education program (IEP) requirements under Part B of the Education of the Handicapped Act, as amended by Pub. L. 94-142. This interpretation is issued in response to public inquiries requesting Department policy and guidance on this matter.

EFFECTIVE DATE: This interpretation is expected to take effect 45 days after it is transmitted to Congress. Interpretations are usually transmitted to Congress several days before they are published in the Federal Register. The effective date is changed by statute if Congress takes certain adjournments. If you want to know the effective date of this interpretation, call or write the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas B. Irvin, Office of Special Education, Department of Education, Donohoe Building, Room 4046, 400 Maryland Avenue, SW., Washington, D.C. 20202, telephone: (202) 472-4825.

SUPPLEMENTARY INFORMATION:**A. Background**

Under Part B of the Education of the Handicapped Act (EHA-B or "the Act") (20 U.S.C. 1411-1420), as amended by Pub. L. 94-142, the Department of Education makes Federal funds available to States to assist them in the provision of special education and related services to handicapped children. In order to receive assistance under this grant program, a State must demonstrate to the Secretary that various provisions of the Act are met, including the requirement that all handicapped children within the State have available a free appropriate public education. The Act defines a "free appropriate public education" as "special education and related services which . . . are provided in conformity with the individualized education program required" by the Act (20 U.S.C. 1401(18)(D)).

An "individualized education program" (IEP) is defined by the Act as a written statement for each handicapped child developed in any meeting by a representative of the local educational

agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved. 20 U.S.C. 1401(19)

Section 614(a)(5) of the Act (20 U.S.C. 1414(a)(5)) provides that the IEP for each handicapped child must be reviewed and, if necessary, revised at least annually.

A detailed set of regulations was issued under EHA-B on August 23, 1977 (42 FR 42474), and codified in the Code of Federal Regulations (CFR) at 45 CFR Part 121a. Included in those regulations are several sections on IEPs, published as 45 CFR 121a.340-121a.349. (See also the summary of, and responses to, the public comments on the proposed version of those sections, 42 FR 42507-08 (August 23, 1977).) These regulations became effective on October 1, 1977.

B. Purpose of Document

Over the past three years, numerous questions have arisen concerning the meaning of the IEP provisions of the statute and regulations. Some of those provisions have been interpreted differently by various State and local agencies. Other questions have been raised concerning various IEP matters that are not explicitly addressed in the regulations. Finally, numerous inquiries have been received concerning how to most effectively carry out the IEP requirements.

For these reasons, the Secretary has determined that it would be appropriate to publish a comprehensive document that clarifies and interprets the IEP provisions, answers some of the most frequently asked questions about those provisions, and provides technical assistance to interested parties. This document is intended to serve those purposes.

C. Development of Document

This interpretation culminates a process which involved extensive public review and comment, including: (1) Comments from a series of public meetings conducted during the summer

of 1979; (2) background papers submitted by an *ad-hoc* task force on IEPs; and (3) more than one hundred written comments from reviewers of various drafts of the document. All written comments were reviewed, and the suggestions and concerns of the commenters were considered in preparing the document.

D. Effect of Document

The primary purpose of this document is to clarify and interpret the IEP provisions of the Act and regulations. Since those provisions have the force and effect of law, the Secretary regards the clarifications and interpretations in the document as legally binding, and the Department will follow them in providing advice and in determining whether affected agencies are in compliance with the Act and regulations. In addition, the document includes non-binding suggestions and guidance on how to carry out the various legally binding requirements.

The legally binding requirements in the interpretation are identified by such mandatory language as "must", "the IEP *would have to be revised*", or "labels *may not be used*". The non-binding suggestions and guidance are stated in such non-mandatory language as "the agency should" or "it is expected that."

E. Organization of Document

Part I of the document sets out the major purposes and functions of the IEP requirement. Part II clarifies and interprets the individual provisions of the IEP regulations (§§ 300.340-300.349).

F. Redesignation of Regulations

As a result of the creation of the Department of Education, the regulations under EHA-B were recently transferred to title 34 (Education) of the CFR (45 FR 77368, November 21, 1980). The EHA-B regulations were transferred and redesignated as 34 CFR Part 300. Individual section numbers, however, have not changed. For example, the sections on IEP's, previously 45 CFR 121a.340-121a.349, have been redesignated as 34 CFR 300.340-300.349.

Call for Public Comment

The Secretary is interested in receiving public comments on the extent to which the Department should provide further guidance on individualized education programs. These comments may be sent at any time to the Department contact person identified in the beginning of this document.

(Catalog of Federal Domestic Assistance No. 84.027, Education of Handicapped Children, Part B)

Dated: January 9, 1981.

Shirley M. Hufstader,
Secretary of Education.

34 CFR Part 300 is amended by adding the following appendix:

Appendix—Notice of Interpretation

- I. Purpose of the IEP
- II. IEP Requirements

§ 300.340 Definition

§ 300.341 State educational agency responsibility

1. Who is responsible for ensuring the development of IEPs for handicapped children served by a public agency other than an LEA?

2. For a child placed out of State by a public agency, is the placing or receiving State responsible for the child's IEP?

§ 300.342 When individualized education programs must be in effect

3. In requiring that an IEP be in effect before special education and related services are provided, what does "be in effect" mean?

4. How much of a delay is permissible between the time a handicapped child's IEP is finalized and when special education is provided?

5. For a handicapped child receiving special education for the first time, when must an IEP be developed—before placement or after placement?

6. If a handicapped child has been receiving special education in one LEA and moves to another community, must the new LEA hold an IEP meeting before the child is placed in a special education program?

§ 300.343 Meetings

7. What is the purpose of the 30 day timeline in § 300.343(c)?

8. Must the agency hold a separate meeting to determine a child's eligibility for special education and related services, or can this step be combined with the IEP meeting?

9. Must IEPs be reviewed or revised at the beginning of each school year?

10. How frequently must IEP meetings be held and how long should they be?

11. Who can initiate IEP meetings?

12. May IEP meetings be tape-recorded?

§ 300.344 Participants in meetings

(Agency representative)

13. Who can serve as the "representative of the public agency" at an IEP meeting?

14. Who is the "representative of the public agency" if a handicapped child is served by a public agency other than the SEA or LEA?

(The child's teacher)

15. For a handicapped child being considered for initial placement in special education, which teacher should attend the IEP meeting?

16. If a handicapped child is enrolled in both regular and special education classes, which teacher should attend the IEP meeting?

17. If a handicapped child in high school attends several regular classes, must all of the child's regular teachers attend the IEP meeting?

18. If a child's primary handicap is a speech impairment, must the child's regular teacher attend the IEP meeting?

19. If a child is enrolled in a special education class because of a primary handicap and also receives speech-language pathology services, must both specialists attend the IEP meeting?

(The child, parents, other individuals)

20. When may representatives of teacher organizations attend IEP meetings?

21. When may a handicapped child attend an IEP meeting?

22. Do the parents of a handicapped student retain the right to attend the IEP meeting when the student reaches the age of majority?

23. Must related services personnel attend IEP meetings?

24. Are agencies required to use a case manager in the development of a handicapped child's IEP?

25. For a child with a suspected speech impairment, who must represent the evaluation team at the IEP meeting?

§ 300.345 Parent participation

26. What is the role of the parents at an IEP meeting?

27. What is the role of a surrogate parent at an IEP meeting?

28. Must the public agency let the parents know who will be at the IEP meeting?

29. Are parents required to sign IEPs?

30. If the parent signs the IEP, does the signature indicate consent for initial placement?

31. Do parents have the right to a copy of their child's IEP?

32. Must parents be informed at the IEP meeting of their right to appeal?

33. Does the IEP include ways for parents to check the progress of their children?

34. Must IEPs include specific "checkpoint intervals" for parents to confer with teachers and to revise or update their children's IEPs?

35. If the parents and agency are unable to reach agreement at an IEP meeting, what steps should be followed until agreement is reached?

§ 300.346 Content of the individualized education program

(Present levels of educational performance)

36. What should be included in the statement of the child's present levels of educational performance?

(Annual goals and short term objectives)

37. Why are goals and objectives required in the IEP?

38. What are "annual goals" in an IEP?

39. What are "short term instructional objectives" in an IEP?

40. Should the IEP goals and objectives focus only on special education and related services, or should they relate to the total education of the child?

41. Should there be a relationship between the goals and objectives in the IEP and those that are in instructional plans of special education personnel?

42. When must IEP objectives be written—before placement or after placement?

43. Can short term instructional objectives be changed without initiating another IEP meeting?

(Specific special education and related services)

44. Must the IEP include all special education and related services needed by the child or only those available from the public agency?

45. Is the IEP a commitment to provide services—i.e., must a public agency provide all of the services listed in the IEP?

46. Must the public agency itself directly provide the services set out in the IEP?

47. Does the IEP include only special education and related services or does it describe the total education of the child?

48. If modifications are necessary for a handicapped child to participate in a regular education program, must they be included in the IEP?

49. When must physical education (PE) be described or referred to in an IEP?

50. If a handicapped child is to receive vocational education, must it be described or referred to in the student's IEP?

51. Must the IEP specify the amount of services or may it simply list the services to be provided?

52. Must a handicapped child's IEP indicate the extent to which the child will be educated in the regular educational program?

(Projected dates/Evaluation)

53. Can the anticipated duration of services be for more than twelve months?

54. Must the evaluation procedures and schedules be included as a separate item in the IEP?

(Other IEP content questions)

55. Is it permissible for an agency to have the IEP completed when the IEP meeting begins?

56. Is there a prescribed format or length for an IEP?

57. Is it permissible to consolidate the IEP with the individualized service plan developed under another Federal program?

58. What provisions on confidentiality of information apply to IEPs?

§ 300.347 Private school placements

59. If placement decisions are made at the time the IEP is developed, how can a private school representative attend the meeting?

§ 300.348 Handicapped children in parochial or other private schools**§ 300.349 Individualized education programs—accountability**

60. Is the IEP a performance contract?

Authority: Part B of the Education of the Handicapped Act, as amended (20 U.S.C. 1411-1420), unless otherwise noted.

Individualized Education Programs (IEPs)

Interpretation of Requirements Under Part B of the Education of the Handicapped Act, As Amended by Pub. L. 94-142

I. Purpose of the IEP

There are two main parts of the IEP requirement, as described in the Act and regulations: (1) The IEP meeting(s), at which parents and school personnel jointly make decisions about a handicapped child's educational program, and (2) the IEP document itself, which is a written record of the decisions reached at the meeting. The overall IEP requirement, comprised of these two parts, has a number of purposes and functions:

a. The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to jointly decide what the child's needs are, what services will be provided to meet those needs, and what the anticipated outcomes may be.

b. The IEP process provides an opportunity for resolving any differences between the parents and the agency concerning a handicapped child's special education needs: first, through the IEP meeting, and second, if necessary, through the procedural protections that are available to the parents.

c. The IEP sets forth in writing a commitment of resources necessary to enable a handicapped child to receive needed special education and related services.

d. The IEP is a management tool that is used to ensure that each handicapped child is provided special education and related services appropriate to the child's special learning needs.

e. The IEP is a compliance/monitoring document which may be used by authorized monitoring personnel from each governmental level to determine

whether a handicapped child is actually receiving the free appropriate public education agreed to by the parents and the school.

f. The IEP serves as an evaluation device for use in determining the extent of the child's progress toward meeting the projected outcomes.

Note.—The Act does not require that teachers or other school personnel be held accountable if a handicapped child does not achieve the goals and objectives set forth in the IEP. See § 300.349, *Individualized education program—accountability*.

II. IEP Requirements

This part (1) repeats the IEP requirements in §§ 300.340-300.349 of the regulations (boxed material), (2) provides additional clarification, as necessary, on sections or paragraphs of the regulations on which such clarification is needed, and (3) answers some questions regarding implementation of the IEP requirements that are not expressly addressed in the regulations. These questions and clarifying information are presented in a question and answer format immediately after the particular section of the regulations that is presented.

INDIVIDUALIZED EDUCATION PROGRAMS**§ 300.340 Definition.**

As used in this part, the term "individualized education program" means a written statement for a handicapped child that is developed and implemented in accordance with §§ 300.341-300.349. (20 U.S.C. 1401(19).)

§ 300.341 State educational agency responsibility.

(a) *Public agencies.* The State educational agency shall insure that each public agency develops and implements an individualized education program for each of its handicapped children.

(b) *Private schools and facilities.* The State educational agency shall insure that an individualized education program is developed and implemented for each handicapped child who:

(1) Is placed in or referred to a private school or facility by a public agency; or

(2) Is enrolled in a parochial or other private school and receives special edu-

cation or related services from a public agency.

(20 U.S.C. 1412 (4), (6); 1415(a) (4).)

Comment: This section applies to all public agencies, including other State agencies (e.g., departments of mental health and welfare), which provide special education to a handicapped child either directly, by contract or through other arrangements. Thus, if a State welfare agency contracts with a private school or facility to provide special education to a handicapped child, that agency would be responsible for insuring that an individualized education program is developed for the child.

1. Who is responsible for ensuring the development of IEPs for handicapped children served by a public agency other than an LEA?

The answer will vary from State to State, depending upon State law, policy, or practice. In each State, however, the SEA is ultimately responsible for ensuring that each agency in the State is in compliance with the IEP requirements and the other provisions of the Act and regulations. (See § 300.600 regarding SEA responsibility for all education programs.)

The SEA must ensure that every handicapped child in the State has available a free appropriate public education (FAPE), regardless of which agency, State or local, is responsible for the child. While the SEA has flexibility in deciding the best means to meet this obligation (e.g., through interagency agreements), there can be no failure to provide FAPE due to jurisdictional disputes among agencies.

Note.—Section 300.2(b) states that the requirements of the Act and regulations apply to all political subdivisions of the State that are involved in the education of handicapped children, including (1) the SEA, (2) LEAs, (3) other State agencies (such as Departments of Mental Health and Welfare, and State schools for the deaf or blind), and (4) State correctional facilities.

The following paragraphs outline (1) some of the SEA's responsibilities for developing policies or agreements under a variety of interagency situations, and (2) some of the responsibilities of an LEA when it initiates the placement of a handicapped child in a school or program operated by another State agency:

a. SEA POLICIES OR INTERAGENCY AGREEMENTS. The SEA, through its written policies or agreements, must ensure that IEPs are properly written and implemented for all handicapped children in the State. This applies to each interagency situation that exists in the State, including any of the following: (1) When an LEA initiates the placement of a child in a school or program operated by another State agency (see "LEA-Initiated Placements" in paragraph "b", below); (2) when a State or local agency other than the SEA or LEA places a child in a residential facility or other program; (3) when parents initiate placements in public institutions; and (4) when the courts make placements in correctional facilities.

Note.—This is not an exhaustive list. The SEA's policies must cover any other interagency situation that is applicable in the State, including placements that are made for both educational and for non-educational purposes.

Frequently, more than one agency is involved in developing or implementing a handicapped child's IEP (e.g., when the LEA remains responsible for the child, even though another public agency provides the special education and related services, or when there are shared cost arrangements). It is important that SEA policies or agreements define the role of each agency involved in the situations described above, in order to resolve any jurisdictional problems that could delay the provision of a free appropriate public education to a handicapped child. For example, if a child is placed in a residential facility, any one or all of the following agencies might be involved in the development and/or implementation of the child's IEP: The child's LEA, the SEA, another State agency, an institution or school under that agency, and the LEA where the institution is located.

Note.—The SEA must also ensure that any agency involved in the education of a handicapped child is in compliance with the "least restrictive environment" provisions of the Act and regulations, and, specifically, with the requirement that each handicapped child's placement (1) be determined at least annually, (2) be based on the child's IEP, and (3) be as close as possible to the child's home (§ 300.552(a), *Placements*.)

b. LEA-INITIATED PLACEMENTS. When an LEA is responsible for the education of a handicapped child, the LEA is also responsible for developing the child's IEP. The LEA has this responsibility even if development of the IEP results in placement in a State-operated school or program.

Note.—The IEP must be developed before the child is placed. See Question 5, below.) When placement in a State-operated school is necessary, the affected State agency or agencies must be involved by the LEA in the development of the IEP. (See response to Question 59, below, regarding participation of a private school representative at the IEP meeting.)

After the child enters the State school, meetings to review or revise the child's IEP could be conducted by either the LEA or the State school, depending upon State law, policy, or practice. However, both agencies should be involved in any decisions made about the child's IEP (either by attending the IEP meetings, or through correspondence or telephone calls). There must be a clear decision, based on State law, as to whether responsibility for the child's education is transferred to the State school or remains with the LEA, since this decision determines which agency is responsible for reviewing or revising the child's IEP.

2. For a child placed out of State by a public agency, is the placing or receiving State responsible for the child's IEP?

The "placing" State is responsible for developing the child's IEP and ensuring that it is implemented. The determination of the specific agency in the placing State that is responsible for the child's IEP would be based on State law, policy, or practice. However, as indicated in Question 1, above, the SEA in the placing State is responsible for ensuring that the child has available a free appropriate public education.

Note.—The Department is considering the possibility of publishing a separate document on out-of-State placements. That paper would address the responsibilities of the placing and receiving States under both EHA-B and Section 504 of the Rehabilitation Act of 1973.

§ 300.342 When individualized education programs must be in effect.

(a) On October 1, 1977, and at the beginning of each school year thereafter, each public agency shall have in effect an individualized education program for every handicapped child who is receiving special education from that agency.

(b) An individualized education program must:

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings under § 300.343. (20 U.S.C. 1412 (2) (B), (4), (5); 1414(a) (5); Pub. L. 94-142, Sec. 8(c) (1975).)

Comment. Under paragraph (b) (2), it is expected that a handicapped child's individualized education program (IEP) will be implemented immediately following the meetings under § 300.343. An exception to this would be (1) when the meetings occur during the summer or a vacation period, or (2) where there are circumstances which require a short delay (e.g., working out transportation arrangements). However, there can be no undue delay in providing special education and related services to the child.

3. In requiring that an IEP be in effect before special education and related services are provided, what does "be in effect" mean?

As used in the regulations, the term "be in effect" means that the IEP (1) has been developed properly (i.e., at a meeting(s) involving all of the participants specified in the Act (parent, teacher, agency representative, and, where appropriate, the child)); (2) is regarded by both the parents and agency as appropriate in terms of the child's needs, specified goals and objectives, and the services to be provided; and (3) will be implemented as written.

4. How much of a delay is permissible between the time a handicapped child's IEP is finalized and when special education is provided?

In general, no delay is permissible. It is expected that the special education and related services set out in a child's IEP will be provided by the agency beginning immediately after the IEP is finalized. The comment following Section 300.342 identifies some exceptions ((1) when the meetings occur during the summer or other vacation period, or (2) when there are circumstances which require a short delay, such as working out transportation arrangements). However, unless otherwise specified in the IEP, the IEP services must be provided as soon as possible following the meeting.

Note.—§ 300.342(d) requires that the IEP include the "projected dates for initiation of services."

5. For a handicapped child receiving special education for the first time, when must an IEP be developed—before placement or after placement?

An IEP must "be in effect before special education and related services are provided to a child." (§ 300.342(b)(1), emphasis added.) The appropriate placement for a given handicapped child cannot be determined until after decisions have been made about what the child's needs are and what will be provided. Since these decisions are made at the IEP meeting, it would not be permissible to first place the child and then develop the IEP. Therefore, the IEP must be developed before placement. The above requirement does not preclude temporarily placing an eligible handicapped child in a program as part

of the evaluation process—before the IEP is finalized—to aid in determining the most appropriate placement for the child. It is essential that the temporary placement not become the final placement before the IEP is finalized. In order to ensure that this does not happen, the State might consider requiring LEAs to take the following actions:

a. Develop an "interim" IEP for the child, which sets out the specific conditions and timeliness for the trial placement. (See paragraph "c", below.)

b. Ensure that the parents agree to the interim placement before it is carried out, and that they are involved throughout the process of developing, reviewing, and revising the child's IEP.

c. Set a specific timeline (e.g., 30 days) for completing the evaluation and making judgments about the most appropriate placement for the child.

d. Conduct an IEP meeting at the end of the trial period in order to finalize the child's IEP.

Note.—Once a handicapped child's IEP is in effect and the child is placed in a special education program, the teacher might develop detailed lesson plans or objectives based on the IEP. However, these lesson plans and objectives are not required to be a part of the IEP itself. (See Questions 37–43, below, regarding IEP goals and objectives.)

6. If a handicapped child has been receiving special education in one LEA and moves to another community, must the new LEA hold an IEP meeting before the child is placed in a special education program?

It would not be necessary for the new LEA to conduct an IEP meeting if: (1) A copy of the child's current IEP is available; (2) the parents indicate that they are satisfied with the current IEP; and (3) the new LEA determines that the current IEP is appropriate and can be implemented as written.

If the child's current IEP is not available, or if either the LEA or the parent believes that it is not appropriate, an IEP meeting would have to be conducted. This meeting should take place within a short time after the child enrolls in the new LEA (normally, within one week).

Note.—The child must be placed in a special education program immediately after the IEP is finalized. See Question 4, above.

If the LEA or the parents believe that additional information is needed (e.g., the school records from the former LEA) or that a new evaluation is necessary before a final placement decision can be made, it would be permissible to temporarily place the child in an interim program before the IEP is finalized. (See Question 5, above.)

§ 300.343 Meetings.

(a) General. Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program.

(b) Handicapped children currently served. If this public agency has determined that a handicapped child will receive special education during school year 1977–1978, a meeting must be held early enough to insure that an individualized education program is developed by October 1, 1977.

(c) Other handicapped children. For a handicapped child who is not included under paragraph (b) of this action, a meeting must be held within thirty calendar days of a determination that this child needs special education and related services.

(d) Review. Each public agency shall initiate and conduct meetings to periodically review each child's individualized education program and if appropriate revise its provisions. A meeting must be held for this purpose at least once a year.

(20 U.S.C. 1412 (2) (B), (4), (6), 1414 (a) (5).)

Comment. The dates on which agencies must have individualized education programs (IEPs) in effect are specified in §§ 300.342 (October 1, 1977, and the beginning of each school year thereafter). However, except for new handicapped children (i.e., those evaluated and determined to need special education after October 1, 1977), the timing of meetings to develop, review, and revise IEPs is left to the discretion of each agency.

In order to have IEPs in effect by the dates in §§ 300.342, agencies could hold meetings at the end of the school year or during the summer preceding those dates. In meeting the October 1, 1977 timeline, meetings could be conducted up through the October 1 date. Thereafter, meetings may be held any time throughout the year, as long as IEPs are in effect at the beginning of each school year.

The statute requires agencies to hold a meeting at least once each year in order to review, and if appropriate revise, each child's IEP. The timing of those meetings could be on the anniversary date of the last IEP meeting on the child, but this is left to the discretion of the agency.

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7. What is the purpose of the 30 day timeline in Section 300.343(c)?

The 30 day timeline in § 300.343(c) ensures that there will not be a significant delay between the time a child is evaluated and when the child begins to receive special education. Once it is determined—through the evaluation—that a child is handicapped, the public agency has up to 30 days to hold an IEP meeting.

Note.—See Questions 4 and 5, above, regarding finalization of IEP and placement of the child.

8. Must the agency hold a separate meeting to determine a child's eligibility for special education and related services, or can this step be combined with the IEP meeting?

Paragraph (e) of § 300.532 (Evaluation procedures) provides that the evaluation of each handicapped child must be "made by a multidisciplinary team or group of persons . . .". The decisions regarding (1) whether the team members actually meet together, and (2) whether such meetings are separate from the IEP meeting, are matters that are left to the discretion of State or local agencies.

In practice, some agencies hold separate eligibility meetings with the multidisciplinary team before the IEP meeting.

Note.—When separate meetings are conducted, placement decisions would be made at the IEP meeting. However, placement options could be discussed at the eligibility meeting.

Other agencies combine the two steps into one. If a combined meeting is conducted, the public agency must include the parents as participants at the meeting. (See § 300.345 for requirements on parent participation.)

Note.—If, at a separate eligibility meeting, a decision is made that a child is not eligible for special education, the parents should be notified about the decision.

9. Must IEPs be reviewed or revised at the beginning of each school year?

No. The basic requirement in the regulations is that IEPs must be in effect at the beginning of each school year. Meetings must be conducted at least once each year to review and, if necessary, revise each handicapped child's IEP. However, the meetings may be held anytime during the year, including (1) at the end of the school

year, (2) during the summer, before the new school year begins, or (3) on the anniversary date of the last IEP meeting on the child.

10. How frequently must IEP meetings be held and how long should they be?

Section 614(a)(5) of the Act provides that each public agency must hold meetings periodically, but not less than annually, to review each child's IEP and, if appropriate, revise its provisions. The legislative history of the Act makes it clear that there should be as many meetings a year as any one child may need. (121 Cong. Rec. S20428-29 (Nov. 19, 1975) (remarks of Senator Stafford))

There is no prescribed length for IEP meetings. In general, meetings (1) will be longer for initial placements and for children who require a variety of complex services, and (2) will be shorter for continuing placements and for children who require only a minimum amount of services. In any event, however, it is expected that agencies will allow sufficient time at the meetings to ensure meaningful parent participation.

11. Who can initiate IEP meetings?

IEP meetings are initiated and conducted at the discretion of the public agency. However, if the parents of a handicapped child believe that the child is not progressing satisfactorily or that

there is a problem with the child's current IEP, it would be appropriate for the parents to request an IEP meeting. The public agency should grant any reasonable request for such a meeting.

Note.—Under § 300.506(e), the parents or agency may initiate a due process hearing at any time regarding any matter related to the child's IEP.

If a child's teacher(s) feels that the child's placement or IEP services are not appropriate to the child, the teacher(s) should follow agency procedures with respect to (1) calling or meeting with the parents and/or (2) requesting the agency to hold another meeting to review the child's IEP.

12. May IEP meetings be tape-recorded?

The use of tape recorders at IEP meetings is not addressed by either the Act or the regulations. Although taping is clearly not required, it is permissible at the option of either the parents or the agency. However, if the recording is maintained by the agency, it is an "education record", within the meaning of the Family Educational Rights and Privacy Act ("FERPA"; 20 U.S.C. 1232g), and would, therefore, be subject to the confidentiality requirements of the regulations under both FERPA (34 CFR Part 99) and EHA-B (34 CFR 300.560-.565).

§ 300.344 Participants in meetings.

(a) **General.** The public agency shall insure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to § 300.545.

(4) The child, where appropriate.

(5) Other individuals at the discretion of the parent or agency.

(b) **Evaluation personnel.** For a handicapped child who has been evaluated for the first time, the public agency shall insure:

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

(20 U.S.C. 1401(10); 1412 (2) (B). (4). (a); 1414(a) (6).)

Comment. 1. In deciding which teacher will participate in meetings on a child's individualized education program, the agency may wish to consider the following possibilities:

(a) For a handicapped child who is receiving special education, the "teacher" could be the child's special education teacher. If the child's handicap is a speech impairment, the "teacher" could be the speech-language pathologist.

(b) For a handicapped child who is being considered for placement in special education, the "teacher" could be the child's regular teacher, or a teacher qualified to provide education in the type of program in which the child may be placed, or both.

(c) If the child is not in school or has more than one teacher, the agency may designate which teacher will participate in the meeting.

2. Either the teacher or the agency representative should be qualified in the area of the child's suspected disability.

3. For a child whose primary handicap is a speech impairment, the evaluation personnel participating under paragraph (b) (1) of this section would normally be the speech-language pathologist.

13. Who can serve as the "representative of the public agency" at an IEP meeting?

The "representative of the public agency" could be any member of the school staff, other than the child's teacher, who is "qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children." (Section 602(19) of the Act.) Thus, the agency representative could be (1) a qualified special education administrator, supervisor, or teacher (including a speech-language pathologist), or (2) a school principal or other administrator—if the person is qualified to provide, or supervise the provision of, special education.

Each State or local agency may determine which specific staff member will serve as the agency representative. However, the representative should be able to ensure that whatever services are set out in the IEP will actually be provided and that the IEP will not be vetoed at a higher administrative level within the agency. Thus, the person selected should have the authority to commit agency resources (i.e., to make decisions about the specific special education and related services that the agency will provide to a particular child).

For a handicapped child who requires only a limited amount of special education, the agency representative able to commit appropriate resources could be a special education teacher, or a speech-language pathologist, other than the child's teacher. For a child who requires extensive special education and related services, the agency representative might need to be a key administrator in the agency.

Note.—IEP meetings for continuing placements could be more routine than those for initial placements, and, thus, might not require the participation of a key administrator.

14. Who is the "representative of the public agency" if a handicapped child is served by a public agency other than the SEA or LEA?

The answer depends on which agency is responsible, under State law, policy, or practice, for any one or all of the following: (1) The child's education, (2) placing the child, and (3) providing (or paying for the provision of) special education and related services to the child.

In general, the agency representative at the IEP meeting would be a member

of the agency or institution that is responsible for the child's education. For example, if a State agency (1) places a child in an institution, (2) is responsible under State law for the child's education, and (3) has a qualified special education staff at the institution, then a member of the institution's staff would be the agency representative at the IEP meetings.

Sometimes there is no special education staff at the institution, and the children are served by special education personnel from the LEA where the institution is located. In this situation, a member of the LEA staff would usually serve as the agency representative.

Note.—In situations where the LEA places a child in an institution, paragraph "b" of the response to Question 1, above, would apply.

15. For a handicapped child being considered for initial placement in special education, which teacher should attend the IEP meeting?

The teacher could be either (1) a teacher qualified to provide special education in the child's area of suspected disability, or (2) the child's regular teacher. At the option of the agency, both teachers could attend. In any event, there should be at least one member of the school staff at the meeting (e.g., the agency representative or the teacher) who is qualified in the child's area of suspected disability.

Note.—Sometimes more than one meeting is necessary in order to finalize a child's IEP. If, in this process, the special education teacher who will be working with the child is identified, it would be useful to have that teacher participate in the meeting with the parents and other members of the IEP team in finalizing the IEP. When this is not possible, the agency should ensure that the teacher is given a copy of the child's IEP as soon as possible after the IEP is finalized and before the teacher begins working with the child.

16. If a handicapped child is enrolled in both regular and special education classes, which teacher should attend the IEP meeting?

In general, the teacher at the IEP meeting should be the child's special education teacher. At the option of the agency or the parent, the child's regular teacher also might attend. If the regular teacher does not attend, the agency should either provide the regular teacher with a copy of the IEP or inform the regular teacher of its contents. Moreover, the agency should ensure that the special education teacher, or other appropriate support person, is able, where necessary, to consult with and be a resource to the child's regular teacher.

17. If a handicapped child in high school attends several regular classes,

must all of the child's regular teachers attend the IEP meeting?

No. Only one teacher must attend. However, at the option of the LEA, additional teachers of the child may attend. The following points should be considered in making this decision:

a. Generally, the number of participants at IEP meetings should be small. Small meetings have several advantages over large ones. For example, they (1) allow for more open, active parent involvement, (2) are less costly, (3) are easier to arrange and conduct, and (4) are usually more productive.

Note.—In an informal examination of IEPs from five States, Department staff found that, on the average, IEP meetings were attended by four persons.

b. While large meetings are generally inappropriate, there may be specific circumstances in which the participation of additional staff would be beneficial. When the participation of the regular teachers is considered by the agency or the parents to be beneficial to the child's success in school (e.g., in terms of the child's participation in the regular education program), it would be appropriate for them to attend the meeting.

c. Although the child's regular teachers would not routinely attend IEP meetings, they should either (1) be informed about the child's IEP by the special education teacher or agency representative, and/or (2) receive a copy of the IEP itself.

18. If a child's primary handicap is a speech impairment, must the child's regular teacher attend the IEP meeting?

No. A speech-language pathologist would usually serve as the child's "teacher" for purposes of the IEP meeting. The regular teacher could also attend at the option of the school.

19. If a child is enrolled in a special education class because of a primary handicap, and also receives speech-language pathology services, must both specialists attend the IEP meeting?

No. It is not required that both attend. The special education teacher would attend the meeting as the child's "teacher". The speech-language pathologist could either (1) participate in the meeting itself, or (2) provide a written recommendation concerning the nature, frequency, and amount of services to be provided to the child.

20. When may representatives of teacher organizations attend IEP meetings?

Under the Family Educational Rights and Privacy Act ("FERPA"; 20 U.S.C.

1232g) and implementing regulations (34 CFR Part 99), officials of teacher organizations may not attend IEP meetings at which personally identifiable information from the student's education records may be discussed—except with the prior written consent of the parents. (See 34 CFR 99.30(a)(1).)

In addition, EHA-B does not provide for the participation of representatives of teacher organizations at IEP meetings. The legislative history of the Act makes it clear that attendance at IEP meetings should be limited to those who have an intense interest in the child. (121 Cong. Rec. S10974 (June 18, 1975) (remarks of Sen. Randolph).) Since a representative of a teacher organization would be concerned with the interests of the teacher rather than the interests of the child, it would be inappropriate for such an official to attend an IEP meeting.

21. When may a handicapped child attend an IEP meeting?

Generally, a handicapped child should attend the IEP meeting whenever the parent decides that it is appropriate for the child to do so. Whenever possible, the agency and parents should discuss the appropriateness of the child's participation before a decision is made, in order to help the parents determine whether or not the child's attendance will be (1) helpful in developing the IEP and/or (2) directly beneficial to the child. The agency should inform the parents before each IEP meeting—as part of the "notice of meeting" required under § 300.345(b)—that they may invite their child to participate.

Note.—The parents and agency should encourage older handicapped children (particularly those at the secondary school level) to participate in their IEP meetings.

22. Do the parents of a handicapped student retain the right to attend the IEP meeting when the student reaches the age of majority?

The Act is silent concerning any modification of the rights of a handicapped student's parents when the student reaches the age of majority. The Department is considering providing further guidance on this issue in a separate document.

23. Must related services personnel attend IEP meetings?

No. It is not required that they attend. However, if a handicapped child has an identified need for related services, it would be appropriate for the related services personnel to attend the meeting

or otherwise be involved in developing the IEP. For example, when the child's evaluation indicates the need for a specific related service (e.g., physical therapy, occupational therapy, or counseling), the agency should ensure that a qualified provider of that service either (1) attends the IEP meeting, or (2) provides a written recommendation concerning the nature, frequency, and amount of service to be provided to the child.

Note.—This written recommendation could be a part of the evaluation report.

24. Are agencies required to use a case manager in the development of a handicapped child's IEP?

No. However, some agencies have found it helpful to have a special educator or some other school staff member (e.g., a social worker, counselor, or psychologist) serve as coordinator or case manager of the IEP process for an individual child or for all handicapped children served by the agency. Examples of the kinds of activities which case managers might carry out are (1) coordinating the multidisciplinary evaluation; (2) collecting and synthesizing the

evaluation reports and other relevant information about a child that might be needed at the IEP meeting; (3) communicating with the parents; and (4) participating in, or conducting, the IEP meeting itself.

25. For a child with a suspected speech impairment, who must represent the evaluation team at the IEP meeting?

No specific person must represent the evaluation team. However, a speech-language pathologist would normally be the most appropriate representative. For many children whose primary handicap is a speech impairment, there may be no other evaluation personnel involved. The comment following § 300.532 (Evaluation procedures) states:

Children who have a speech impairment as their primary handicap may not need a complete battery of assessments (e.g., psychological, physical, or adaptive behavior). However, a qualified speech-language pathologist would (1) evaluate each speech impaired child using procedures that are appropriate for the diagnosis and appraisal of speech and language disorders, and (2) where necessary, make referrals for additional assessments needed to make an appropriate placement decision.

§300.345 Parent participation.

(a) Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:

(1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b) The notice under paragraph (a) (1) of this section must indicate the purpose, time, and location of the meeting, and who will be in attendance.

(c) If neither parent can attend, the public agency shall use other methods to insure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place such as:

(1) Detailed records of telephone calls made or attempted and the results of those calls.

(2) Copies of correspondence sent to the parents and any responses received, and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to insure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(f) The public agency shall give the parent, on request, a copy of the individualized education program.

(20 U.S.C. 1401(19); 1412 (2)(B), (4), (6); 1414(a)(5).)

Comment. The notice in paragraph (a) could also inform parents that they may bring other people to the meeting. As indicated in paragraph (c), the procedure used to notify parents (whether oral or written or both) is left to the discretion of the agency, but the agency must keep a record of its efforts to contact parents.

26. What is the role of the parents at an IEP meeting?

The parents of a handicapped child are expected to be equal participants

along with school personnel, in developing, reviewing, and revising the child's IEP. This is an active role in which the parents (1) participate in the

discussion about the child's need for special education and related services, and (2) join with the other participants in deciding what services the agency will provide to the child.

Note.—In some instances, parents might elect to bring another participant to the meeting, e.g., a friend or neighbor, someone outside of the agency who is familiar with applicable laws and with the child's needs, or a specialist who conducted an independent evaluation of the child.)

27. What is the role of a surrogate parent at an IEP meeting?

A surrogate parent is a person appointed to represent the interests of a handicapped child in the educational decision-making process when that child has no other parent representation. The surrogate has all of the rights and responsibilities of a parent under EHA-B. Thus, the surrogate parent is entitled to (1) participate in the child's IEP meeting, (2) see the child's education records, and (3) receive notice, grant consent, and invoke due process to resolve differences. (See § 300.514. *Surrogate parents.*)

28. Must the public agency let the parents know who will be at the IEP meeting?

Yes. In notifying parents about the meeting, the agency "must indicate the purpose, time, and location of the meeting, and *who will be in attendance.*" (§ 300.345(b), emphasis added.) Where possible, the agency should give the name and position of each person who will attend. In addition, the agency should inform the parents of their right to bring other participants to the meeting. (See Question 21, above, regarding participation of the child.) It is also appropriate for the agency to ask whether the parents intend to bring a participant to the meeting.

29. Are parents required to sign IEPs?

Parent signatures are not required by either the Act or regulations. However, having such signatures is considered by parents, advocates, and public agency personnel to be useful.

Note.—A national survey conducted under contract with the Department indicates that, in practice, most IEPs are signed by parents.)

The following are some of the ways in which IEPs signed by parents and/or agency personnel might be used:

a. A signed IEP is one way to document who attended the meeting.

Note.—This is useful for monitoring and compliance purposes.

If signatures are not used, the agency

must document attendance in some other way.

b. An IEP signed by the parents is one way to indicate that the parents approved the child's special education program.

Note.—If, after signing, the parents feel that a change is needed in the IEP, it would be appropriate for them to request another meeting. See Question 11, above.

c. An IEP signed by an agency representative provides the parents a signed record of the services that the agency has agreed to provide.

Note.—Even if the school personnel do not sign, the agency still must provide, or ensure the provision of, the services called for in the IEP.

30. If the parent signs the IEP, does the signature indicate consent for initial placement?

The parent's signature on the IEP would satisfy the consent requirement concerning initial placement of the child (§ 300.504(b)(1)(ii)) only if the IEP includes a statement on initial placement which meets the definition of "consent" in § 300.500:

"Consent" means that: (a) the parent has been fully informed of all information relevant to the activity for which consent is sought . . .

(b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) which will be released and to whom; and

(c) The parent understands that the granting of consent is voluntary . . . and may be revoked at any time.

31. Do parents have the right to a copy of their child's IEP?

Yes. Section 300.345(f) states that "the public agency shall give the parent, on request, a copy of the individualized education program." In order that parents may know about this provision, it is recommended that they be informed about it at the IEP meeting and/or receive a copy of the IEP itself a reasonable time following the meeting.

Note.—The National Committee for Citizens in Education reports that in a 1979 survey of approximately 2,500 parents of handicapped children in 46 States, nearly 60% indicated that a completed copy of the IEP had been made available for them to keep.

32. Must parents be informed at the IEP meeting of their right to appeal?

If the agency has already informed the parents of their right to appeal, as it is required to do under the prior notice provisions of the regulations (§§ 300.504–300.505), it would not be necessary for the agency to do so again at the IEP meeting.

• Section 300.504(a) of the regulations states that "written notice which meets the requirements under § 300.503 must be given to parents a reasonable time" before the public agency proposes or refuses "to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child."

• Section 300.505(a) states that the notice must include "(1) A full explanation of all procedural safeguards available to parents" under the due process provisions of the regulations (§§ 300.500–300.589).

The IEP meeting serves as a communication vehicle between parents and school personnel, and enables them, as equal participants, to jointly decide upon what the child's needs are, what will be provided, and what the anticipated outcomes may be. If, during the IEP meeting, parents and school staff are unable to reach agreement, the agency should remind the parents that they may seek to resolve their differences through the due process procedures under the Act.

Note.—Section 300.506(a) states that "a parent or public educational agency may initiate a hearing on any matters described in § 300.504(a)(1) and (2)."

Every effort should be made to resolve differences between parents and school staff without resort to a due process hearing (i.e., through voluntary mediation or some other informal step). However, mediation or other informal procedures may not be used to deny or delay a parent's right to a due process hearing. (See § 300.506. *Impartial due process hearing.*)

33. Does the IEP include ways for parents to check the progress of their children?

In general, the answer is yes. The IEP document is a written record of decisions jointly made by parents and school personnel at the IEP meeting regarding a handicapped child's special education program. That record includes agreed upon items, such as goals and objectives, and the specific special education and related services to be provided to the child.

The goals and objectives in the IEP should be helpful to both parents and school personnel, in a general way, in checking on a child's progress in the special education program. (See Questions 37–43, below, regarding goals and objectives in the IEP.) However, since the IEP is not intended to include the specifics about a child's total educational program that are found in

daily, weekly, or monthly instructional plans, parents will often need to obtain more specific, on-going information about the child's progress—through parent-teacher conferences, report cards and other reporting procedures ordinarily used by the agency.

34. Must IEPs include specific "checkpoint intervals" for parents to confer with teachers and to revise or update their children's IEPs?

No. A handicapped child's IEP is not required to include specific "checkpoint intervals" (i.e., meeting dates) for reviewing the child's progress. However, in individual situations, specific meeting dates could be designated in the IEP, if the parents and school personnel believe that it would be helpful to do so.

Although meeting dates are not required to be set out in the IEP itself, there are specific provisions in the regulations and in this document regarding agency responsibilities in initiating IEP meetings, including the following: (1) Public agencies must hold meetings periodically, but not less than annually, to review, and if appropriate, revise, each child's IEP (§ 300.343(d)); (2) there should be as many meetings a year as the child needs (see Question 10, above); and (3) agencies should grant any reasonable parental request for an IEP meeting (see Question 11, above).

In addition to the above provisions, it is expected that, through an agency's general reporting procedures for all children in school, there will be specific designated times for parents to review their children's progress (e.g., through periodic parent-teacher conferences, and/or the use of report cards, letters, or other reporting devices).

35. If the parents and agency are unable to reach agreement at an IEP meeting, what steps should be followed until agreement is reached?

As a general rule, the agency and parents would agree to an interim course of action for serving the child (i.e., in terms of placement and/or services) to be followed until the area of disagreement over the IEP is resolved. The manner in which this interim measure is developed and agreed to by both parties is left to the discretion of the individual State or local agency. However, if the parents and agency cannot agree on an interim measure, the child's last agreed upon IEP would remain in effect in the areas of disagreement until the disagreement is resolved. The following may be helpful

to agencies when there are disagreements:

a. There may be instances where the parents and agency are in agreement about the basic IEP services (e.g., the child's placement and/or the special education services), but disagree about the provision of a particular related service (i.e., whether the service is needed and/or the amount to be provided). In such cases, it is recommended (1) that the IEP be implemented in all areas in which there is agreement, (2) that the document indicate the points of disagreement, and (3) that procedures be initiated to resolve the disagreement.

b. Sometimes the disagreement is with the placement or kind of special education to be provided (e.g., one party proposes a self-contained placement, and the other proposes resource room services). In such cases, the agency might, for example, carry out any one or all of the following steps: (1) Remind the parents that they may resolve their differences through the due process procedures under EHA-B; (2) work with the parents to develop an interim course of action (in terms of placement and/or services) which both parties can agree to until resolution is reached; and (3) recommend the use of mediation, or some other informal procedure for resolving the differences without going to a due process hearing. (See Question 32, above, regarding the right to appeal.)

c. If, because of the disagreement over the IEP, a hearing is initiated by either the parents or agency, the agency may not change the child's placement unless the parents and agency agree otherwise. (See § 300.513, *Child's status during proceedings*.) The following two examples are related to this requirement:

(1) A child in the regular fourth grade has been evaluated and found to be eligible for special education. The agency and parents agree that the child has a specific learning disability. However, one party proposes placement in a self-contained program, and the other proposes placement in a resource room. Agreement cannot be reached, and a due process hearing is initiated. Unless the parents and agency agree otherwise, the child would remain in the regular fourth grade until the issue is resolved.

On the other hand, since the child's need for special education is not in question, both parties might agree—as an interim measure—(1) to temporarily place the child in either one of the programs proposed at the meeting (self-contained program or resource room), or (2) to serve the child through some other temporary arrangement.

(2) A handicapped child is currently receiving special education under an existing IEP. A due process hearing has been initiated regarding an alternative special education placement for the child. Unless the parents and agency agree otherwise, the child would remain in the current placement. In this situation, the child's IEP could be revised, as necessary, and implemented in all of the areas agreed to by the parents and agency, while the area of disagreement (i.e., the child's placement) is being settled through due process.

Note.—If the due process hearing concerns whether or not a particular service should continue to be provided under the IEP (e.g., physical therapy), that service would continue to be provided to the child under the IEP that was in effect at the time the hearing was initiated. (1) unless the parents and agency agree to a change in the services, or (2) until the issue is resolved.

§ 300.346 Content of individualized education program.

The individualized education program for each child must include:

- (a) A statement of the child's present levels of educational performance;
- (b) A statement of annual goals, including short term instructional objectives;
- (c) A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;

(d) The projected dates for initiation of services and the anticipated duration of the services; and

(e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

20 USC 1401(19), 1412 (2)(B), (4) (6), 1414(c)(1)(B); Senate Report No. 91-168 p. 11 (1975)

36. What should be included in the statement of the child's present levels of educational performance?

The statement of present levels of

educational performance will be different for each handicapped child. Thus, determinations about the content

of the statement for an individual child are matters that are left to the discretion of participants in the IEP meetings. However, the following are some points which should be taken into account in writing this part of the IEP.

a. The statement should accurately describe the effect of the child's handicap on the child's performance in any area of education that is affected, including (1) academic areas (reading, math, communication, etc.), and (2) non-academic areas (daily life activities, mobility, etc.).

Note.—Labels such as "mentally retarded" or "deaf" may not be used as a substitute for the description of present levels of educational performance.)

b. The statement should be written in objective measurable terms, to the extent possible. Data from the child's evaluation would be a good source of such information. Test scores that are pertinent to the child's diagnosis might be included, where appropriate. However, the scores should be (1) self-explanatory (i.e., they can be interpreted by all participants without the use of test manuals or other aids), or (2) an explanation should be included. Whatever test results are used should reflect the impact of the handicap on the child's performance. Thus, raw scores would not usually be sufficient.

c. There should be a direct relationship between the present levels of educational performance and the other components of the IEP. Thus, if the statement describes a problem with the child's reading level and points to a deficiency in a specific reading skill, this problem should be addressed under both (1) goals and objectives, and (2) specific special education and related services to be provided to the child.

37. Why are goals and objectives require in the IEP?

The statutory requirements for including annual goals and short term objectives (Section 602(19)(B)), and for having at least an annual review of a handicapped child's IEP (Section 614(a)(5)), provide a mechanism for determining (1) whether the anticipated outcomes for the child are being met (i.e., whether the child is progressing in the special education program) and (2) whether the placement and services are appropriate to the child's special learning needs. In effect, these requirements provide a way for the child's teacher(s) and parents to be able to track the child's progress in special education. However, the goals and objectives in the IEP are not intended to be as specific as the goals and objectives that are normally found in

daily, weekly, or monthly instructional plans.

38. What are "annual goals" in an IEP?

The annual goals in the IEP are statements which describe what a handicapped child can reasonably be expected to accomplish within a twelve month period in the child's special education program. As indicated under Question 36, above, there should be a direct relationship between the annual goals and the present levels of educational performance.

39. What are "short term instructional objectives" in an IEP?

"Short term instructional objectives" (also called "IEP objectives") are measurable, intermediate steps between a handicapped child's present levels of educational performance and the annual goals that are established for the child. The objectives are developed based on a logical breakdown of the major components of the annual goals, and can serve as milestones for measuring progress toward meeting the goals.

In some respects, IEP objectives are similar to objectives used in daily classroom instructional plans. For example, both kinds of objectives are used (1) to describe what a given child is expected to accomplish in a particular area within some specified time period, and (2) to determine the extent to which the child is progressing toward those accomplishments.

In other respects, objectives in IEPs are different from those used in instructional plans, primarily in the amount of detail they provide. IEP objectives provide general benchmarks for determining progress toward meeting the annual goals. These objectives should be projected to be accomplished over an extended period of time (e.g., an entire school quarter or semester). On the other hand, the objectives in classroom instructional plans deal with more specific outcomes that are to be accomplished on a daily, weekly, or monthly basis. Classroom instructional plans generally include details not required in an IEP, such as the specific methods, activities, and materials (e.g., use of flash cards) that will be used in accomplishing the objectives.

40. Should the IEP goals and objectives focus only on special education and related services, or should they relate to the total education of the child?

IEP goals and objectives are concerned primarily with meeting a handicapped child's need for special education and related services, and are not required to cover other areas of the child's education. Stated another way, the goals and objectives in the IEP

should focus on offsetting or reducing the problems resulting from the child's handicap which interfere with learning and educational performance in school. For example, if a learning disabled child is functioning several grades below the child's indicated ability in reading and has a specific problem with word recognition, the IEP goals and objectives would be directed toward (1) closing the gap between the child's indicated ability and current level of functioning, and (2) helping the child increase the ability to use word attack skills effectively (or to find some other approach to increase independence in reading).

For a child with a mild speech impairment, the IEP objectives would focus on improving the child's communication skills, by either (1) correcting the impairment, or (2) minimizing its effect on the child's ability to communicate. On the other hand, the goals and objectives for a severely retarded child would be more comprehensive and cover more of the child's school program than if the child has only a mild handicap.

41. Should there be a relationship between the goals and objectives in the IEP and those that are in instructional plans of special education personnel?

Yes. There should be a direct relationship between the IEP goals and objectives for a given handicapped child and the goals and objectives that are in the special education instructional plans for the child. However, the IEP is not intended to be detailed enough to be used as an instructional plan. The IEP, through its goals and objectives, (1) sets the general direction to be taken by those who will implement the IEP, and (2) serves as the basis for developing a detailed instructional plan for the child.

Note.—See Question 56, below, regarding the length of IEPs.

42. When must IEP objectives be written—before placement or after placement?

IEP objectives must be written before placement. Once a handicapped child is placed in a special education program, the teacher might develop lesson plans or more detailed objectives based on the IEP; however, such plans and objectives are not required to be a part of the IEP itself.

43. Can short term instructional objectives be changed without initiating another IEP meeting?

No. Section 300.343(a) provides that the agency "is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program" (emphasis added). Since a change in short term

instructional objectives constitutes a revision of the child's IEP, the agency must (1) notify the parents of the proposed change (see § 300.504(a)(1)), and (2) initiate an IEP meeting. Note, however, that if the parents are unable or unwilling to attend such a meeting, their participation in the revision of the IEP objectives can be obtained through other means, including individual or conference telephone calls (see § 300.345(c)).

44. Must the IEP include all special education and related services needed by the child or only those available from the public agency?

Each public agency must provide a free appropriate public education to all handicapped children under its jurisdiction. Therefore, the IEP for a handicapped child must include all of the specific special education and related services needed by the child—as determined by the child's current evaluation. This means that the services must be listed in the IEP even if they are not directly available from the local agency, and must be provided by the agency through contract or other arrangements.

45. Is the IEP a commitment to provide services—i.e., must a public agency provide all of the services listed in the IEP?

Yes. Each handicapped child's IEP must include all services necessary to meet the child's identified special education and related services needs; and all services in the IEP must be provided in order for the agency to be in compliance with the Act.

46. Must the public agency itself directly provide the services set out in the IEP?

The public agency responsible for the education of a handicapped child could provide IEP services to the child (1) directly, through the agency's own staff resources, or (2) indirectly, by contracting with another public or private agency, or through other arrangements. In providing the services, the agency may use whatever State, local, Federal, and private sources of support are available for those purposes (see § 300.301(a)). However, the services must be at no cost to the parents, and responsibility for ensuring that the IEP services are provided remains with the public agency.

47. Does the IEP include only special education and related services or does it describe the total education of the child?

The IEP is required to include only those matters concerning the provision of special education and related services and the extent to which the child can participate in regular

education programs. (NOTE: The regulations define "special education" as specially designed instruction to meet the unique needs of a handicapped child, and "related services" as those which are necessary to assist the child to benefit from special education.) (See §§ 300.14 and 300.13, respectively.)

For some handicapped children, the IEP will only address a very limited part of their education (e.g., for a speech impaired child, the IEP would generally be limited to the child's speech impairment). For other children (e.g., those who are profoundly retarded), the IEP might cover their total education. An IEP for a physically impaired child with no mental impairment might consist only of specially designed physical education. However, if the child also has a mental impairment, the IEP might cover most of the child's education.

Note.—The IEP is not intended to be detailed enough to be used as an instructional plan. See Question 41, above.

48. If modifications are necessary for a handicapped child to participate in a regular education program, must they be included in the IEP?

Yes. If modifications (supplementary aids and services) to the regular education program are necessary to ensure the child's participation in that program, those modifications must be described in the child's IEP (e.g., for a hearing impaired child, special seating arrangements or the provision of assignments in writing). This applies to any regular education program in which the student may participate, including physical education, art, music, and vocational education.

49. When must physical education (PE) be described or referred to in the IEP?

Section 300.307(a) provides that "physical education services, specially designed if necessary, must be made available to every handicapped child receiving a free appropriate public education." The following paragraphs (1) set out some of the different PE program arrangements for handicapped students, and (2) indicate whether, and to what extent, PE must be described or referred to in an IEP:

a. Regular PE with non-handicapped students. If a handicapped student can participate fully in the regular PE program without any special modifications to compensate for the student's handicap, it would not be necessary to describe or refer to PE in the IEP. On the other hand, if some modifications to the regular PE program are necessary for the student to be able to participate in that program, those

modifications must be described in the IEP.

b. Specially designed PE. If a handicapped student needs a specially designed PE program, that program must be addressed in all applicable areas of the IEP (e.g., present levels of educational performance, goals and objectives, and services to be provided). However, these statements would not have to be presented in any more detail than the other special education services included in the student's IEP.

c. PE in separate facilities. If a handicapped student is educated in a separate facility, the PE program for that student must be described or referred to in the IEP. However, the kind and amount of information to be included in the IEP would depend on the physical-motor needs of the student and the type of PE program that is to be provided.

Thus, if a student is in a separate facility that has a standard PE program (e.g., a residential school for the deaf), and if it is determined—on the basis of the student's most recent evaluation—that the student is able to participate in that program without any modifications, then the IEP need only note such participation. On the other hand, if special modifications to the PE program are needed for the student to participate, those modifications must be described in the IEP. Moreover, if the student needs an individually designed PE program, that program must be addressed under all applicable parts of the IEP. (See paragraph "b", above.)

Note.—The Department is considering the possibility of publishing a separate document on the PE requirement under the Act and regulations.

50. If a handicapped student is to receive vocational education, must it be described or referred to in the student's IEP?

The answer depends on the kind of vocational education program to be provided. If a handicapped student is able to participate in the regular vocational education program without any modifications to compensate for the student's handicap, it would not be necessary to include vocational education in the student's IEP. On the other hand, if modifications to the regular vocational education program are necessary in order for the student to participate in that program, those modifications must be included in the IEP. Moreover, if the student needs a specially designed vocational education program, then vocational education must be described in all applicable areas of the student's IEP (e.g., present levels of educational performance, goals and objectives, and specific services to be

provided). However, these statements would not have to be presented in any more detail than the other special education services included in the IEP.

Note.—Regulations under the Vocational Education Act provide that (1) certain funds available under that Act for vocational programs for handicapped persons must be used in a manner consistent with the State's plan under EHA-B, and (2) the five-year State Vocational Education Plan "shall describe how the program provided each handicapped child will be planned and coordinated in conformity with and as a part of the child's individualized education program as required by the Education of the Handicapped Act." See 34 CFR 400.141(f)(10), 400.182(f) (formerly 45 CFR 104.141(f)(10), 104.182(f)).

51. Must the IEP specify the amount of services or may it simply list the services to be provided?

The amount of services to be provided must be stated in the IEP, so that the level of the agency's commitment of resources will be clear to parents and other IEP team members. The amount of time to be committed to each of the various services to be provided must be (1) appropriate to that specific service, and (2) stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP.

Changes in the amount of services listed in the IEP cannot be made without holding another IEP meeting. However, as long as there is no change in the overall amount, some adjustments in scheduling the services should be possible (based on the professional judgment of the service provider) without holding another IEP meeting.

Note.—The parents should be notified whenever this occurs.

52. Must a handicapped child's IEP indicate the extent to which the child will be educated in the regular educational program?

Yes. Section 300.346(c) provides that the IEP for each handicapped child must include a "statement of . . . the extent to which the child will be able to participate in regular educational programs." One way of meeting this requirement is to indicate the percent of time the child will be spending in the regular education program with non-handicapped students. Another way is to list the specific regular education classes the child will be attending.

Note.—If a severely handicapped child, for example, is expected to be in a special classroom setting most of the time, it is recommended that, in meeting the above requirement, the IEP include any non-curricular activities in which the child will be participating with non-handicapped students (e.g., lunch, assembly periods, club activities, and other special events).

53. Can the anticipated duration of services be for more than twelve months?

In general, the anticipated duration of services would be up to twelve months. There is a direct relationship between the anticipated duration of services and the other parts of the IEP (e.g., annual goals and short term objectives), and each part of the IEP would be addressed whenever there is a review of the child's program. If it is anticipated that the child will need a particular service for more than one year, the duration of that service could be projected beyond that time in the IEP. However, the duration of each service must be reconsidered whenever the IEP is reviewed.

54. Must the evaluation procedures and schedules be included as a separate item in the IEP?

No. The evaluation procedures and schedules need not be included as a separate item in the IEP, but they must be presented in a recognizable form and be clearly linked to the short term objectives.

Note.—In many instances, these components are incorporated directly into the objectives.

Other Questions About the Content of an IEP

55. Is it permissible for an agency to have the IEP completed when the IEP meeting begins?

No. It is not permissible for an agency to present a completed IEP to parents for their approval before there has been a full discussion with the parents of (1) the child's need for special education and related services, and (2) what services the agency will provide to the child. Section 602(9) of the Act defines the IEP as a written statement developed in any meeting with the agency representative, the teacher, the parent, and, whenever appropriate, the child.

It would be appropriate for agency staff to come prepared with evaluation findings, statements of present levels of educational performance, and a

recommendation regarding annual goals, short term instructional objectives, and the kind of special education and related services to be provided. However, the agency must make it clear to the parents at the outset of the meeting that the services proposed by the agency are only recommendations for review and discussion with the parents. The legislative history of Pub. L. 94-142 makes it clear that parents must be given the opportunity to be active participants in all major decision affecting the education of their handicapped children. (See, e.g., S. Rep. No. 168, 94th Cong. 1st Sess. 13 (1975); S. Rep. No. 455 (Conference Report), 94th Cong. 1st Sess. 47-50 (1975).)

56. Is there a prescribed format or length for an IEP?

No. The format and length of an IEP are matters left to the discretion of State and local agencies. The IEP should be as long as necessary to adequately describe a child's program. However, as indicated in Question 41, above, the IEP is not intended to be a detailed instructional plan. The Federal IEP requirements can usually be met in a one to three page form.

Note.—In a national survey conducted under contract with the Department, it was found that 47% of the IEPs reviewed were 3 pages or less in length.

57. Is it permissible to consolidate the IEP with an individualized service plan developed under another Federal program?

Yes. In instances where a handicapped child must have both an IEP and an individualized service plan under another Federal program, it may be possible to develop a single, consolidated document. *Provided*, That (1) it contains all of the information required in an IEP, and (2) all of the necessary parties participate in its development.

Examples of individualized service plans which might be consolidated with the IEP are: (1) The Individualized Care Plan (Title XIX of the Social Security Act (Medicaid)), (2) the Individualized Program Plan (Title XX of the Social Security Act (Social Services)), (3) the Individualized Service Plan (Title XVI of the Social Security Act (Supplemental Security Income)), and (4) the

Individualized Written Rehabilitation Plan (Rehabilitation Act of 1973).

58. *What provisions on confidentiality of information apply to IEPs?*

IEPs are subject to the confidentiality provisions of both (1) EHA-B (Section 617(c) of the Act; §§ 300.560-300.576 of the regulations), and (2) the Family Educational Rights and Privacy Act ("FERPA", 20 U.S.C. 1232g). An IEP is an "education record" as that term is used in the FERPA and implementing regulations (34 CFR Part 99) and is, therefore, subject to the same

protections as other education records relating to the student.

Note.—Under Section 99.31(a) of the FERPA regulations, an educational agency may disclose personally identifiable information from the education records of a student without the written consent of the parents "if the disclosure is—(1) To other school officials, including teachers, within the educational institution or local educational agency who have been determined by the agency or institution to have legitimate educational interests . . . in that information."

§ 300.347 Private school placements.

(a) *Developing individualized education programs.* (1) Before a public agency places a handicapped child in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an individualized education program for the child in accordance with § 300.343.

(2) The agency shall insure that a representative of the private school facility attends the meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school or facility, including individual or conference telephone calls.

(3) The public agency shall also develop an individualized educational program for each handicapped child who was placed in a private school or facility by the agency before the effective date of these regulations.

(b) *Reviewing and revising individualized education programs.* (1) After a handicapped child enters a private school

or facility, any meetings to review and revise the child's individualized education program may be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency shall insure that the parents and an agency representative:

(i) Are involved in any decision about the child's individualized education program; and

(ii) Agree to any proposed changes in the program before those changes are implemented.

(c) *Responsibility.* Even if a private school or facility implements a child's individualized education program, responsibility for compliance with this part remains with the public agency and the State educational agency.

(20 U.S.C. 1413(a)(4)(B);

59. *If placement decisions are made at the time the IEP is developed, how can a private school representative attend the meeting?*

Generally, a child who requires placement in either a public or private residential school has already been receiving special education, and the parents and school personnel have often jointly been involved over a prolonged period of time in attempting to find the most appropriate placement for the child. At some point in this process (e.g., at a meeting where the child's current

IEP is being reviewed), the possibility of residential school placement might be proposed—by either the parents or school personnel. If both agree, then the matter would be explored with the residential school. A subsequent meeting would then be conducted to finalize the IEP. At this meeting, the public agency must ensure that a representative of the residential school either (1) attends the meeting, or (2) participates through individual or conference telephone calls, or by other means.

§ 300.348 Handicapped children in parochial or other private schools.

If a handicapped child is enrolled in a parochial or other private school and receives special education or related services from a public agency, the public agency shall:

(a) Initiate and conduct meetings to develop, review, and revise an individual-

ized education program for the child, in accordance with § 300.343, and

(b) Insure that a representative of the parochial or other private school attends each meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school, including individual or conference telephone calls.

(20 U.S.C. 1417(a)(4)(A);

Note.—The Department is considering publishing a separate document concerning the education of handicapped children placed in parochial or other private schools by their

parents. Questions concerning IEPs for those children would be addressed in that document.

§ 300.349 Individualized education program—accountability.

Each public agency must provide special education and related services to a handicapped child in accordance with an individualized education program. However, Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.

(20 U.S.C. 1412(2)(B); 1414(a) (5), (6);

Cong. Rec. at H 7152 (daily ed., July 21, 1975).)

Comment: This section is intended to relieve concerns that the individualized education program constitutes a guarantee by the public agency and the teacher that a child will progress at a specified rate. However, this section does not relieve agencies and teachers from making good faith efforts to assist the child in achieving the objectives and goals listed in the individualized education program. Further, the section does not limit a parent's right to complain and ask for revisions of the child's program, or to invoke due process procedures, if the parent feels that these efforts are not being made.

60. Is the IEP a performance contract?

No. Section 300.349 makes it clear that the IEP is *not* a performance contract that imposes liability on a teacher or public agency if a handicapped child does not meet the IEP objectives. While the agency must provide special education and related services in

accordance with each handicapped child's IEP, the Act does not require that the agency, the teacher, or other persons be held accountable if the child does not achieve the growth projected in the written statement.

[FR Doc 81-1803 Filed 1-19-81; 9:45 am]
BILLING CODE 4000-01-M

DEPARTMENT OF EDUCATION POLICY
INTERPRETATION UNDER P.L. 94-142 AND
SECTION 504: PROVISION OF CLEAN
INTERMITTANT CATHETERIZATION

46 FEDERAL REGISTER 4912 (JANUARY 19, 1981)

The Reagan Administration has issued a notice of indefinite postponement of this policy interpretation concerning the provision of clean intermittent catheterization as a "related service." This action is taken as part of a comprehensive review of the related services requirements of Public Law 94-142 and Section 504 of the Rehabilitation Act. See 46 FEDERAL REGISTER 2561 (May 8, 1981).

SUMMARY: The Secretary of Education interprets Part B of the Education of the Handicapped Act and Section 504 of the Rehabilitation Act of 1973 to require public educational agencies to provide clean intermittent catheterization as a "related service" when it is required to provide a free appropriate public education, including services in the least restrictive environment, to handicapped children who are entitled to receive services under those statutes. This interpretation is issued in response to public inquiries regarding Department policy on the matter.

EFFECTIVE DATE: This interpretation is expected to take effect 45 days after it is transmitted to Congress. Interpretations are usually transmitted to Congress several days before they are published in the Federal Register. The effective date of interpretations that are subject to the transmittal requirement is changed by statute if Congress takes certain adjournments. Although the interpretation of Section 504 is not subject to this requirement, the Secretary has decided to set its effective date for the same day as the interpretation of Part B of the Education of the Handicapped Act. If you want to know the effective date of this interpretation, call or write the Department of Education contact persons.

FOR FURTHER INFORMATION CONTACT:

Ms. Shirley A. Jones, Office of Special Education, Department of Education, Donohoe Building, 4th Floor, 400 Maryland Avenue, S.W., Washington, D.C. 20202, telephone: (202) 472-7921.
Mr. Edward A. Stutman, Office for Civil Rights, Department of Education, Switzer Building, Room 5430, 300 C Street, S.W., Washington, D.C. 20202, telephone: (202) 245-0781.

SUPPLEMENTARY INFORMATION:

The Issue

The issue presented is whether Part B of the Education of the Handicapped Act, as amended ("Part B"; 20 U.S.C. 1411-1420) and its regulations (34 CFR Part 300; formerly 45 CFR Part 121a) and Section 504 of the Rehabilitation Act of 1973, as amended ("Section 504"; 29 U.S.C. 794) and its regulations (34 CFR Part 104; formerly 45 CFR Part 84) require public educational agencies to provide clean intermittent catheterization as a related service to eligible handicapped children when those children require the service to receive a free appropriate public education, including services in the least restrictive environment.

DEPARTMENT OF EDUCATION

Office of Special Education

34 CFR Parts 104 and 300

Assistance to States for Education of Handicapped Children, and
Nondiscrimination on the Basis of
Handicap in Programs and Activities
Receiving or Benefiting from Federal
Financial Assistance; Notice of
Interpretations

AGENCY: Department of Education

ACTION: Notice of Interpretation.

The Interpretation

Both Part B and Section 504 require public educational agencies to provide clean intermittent catheterization as a "related service" to handicapped children who are entitled to receive services under those statutes, when it is required to provide a free appropriate public education, including services in the least restrictive environment.

Background

A procedure called "clean intermittent catheterization" ("CIC") is often recommended for physically handicapped children who have impaired function of the urinary bladder. It is usually a relatively simple procedure to administer with minimal training and can be performed by a school nurse, the individual requiring catheterization, or another responsible person, none of whom need to be licensed to perform the service. Therefore, for the limited purpose of interpreting Part B or Section 504, the Secretary does not interpret CIC to be a medical service. In fact, a number of educational agencies are not providing this service to handicapped children as a part of their school health services. A report on the use of CIC accepted and endorsed by the Urology Section of the American Academy of Pediatrics on October 23, 1978, states that "CIC in infancy must be carried out by an adult, but with normal intelligence most children are able to self-catheterize from approximately six to seven years of age, sometimes even earlier."

While the number of children in the United States who currently require assistance with CIC cannot be stated with precision, those children who most often use CIC have myelodysplasia (spina bifida), which medical authorities estimate to occur in 1-2 live births per thousand in the United States. However, not all children with spina bifida require catheterization, and the majority of children who are catheterized do not require assistance with catheterization throughout the years they attend elementary and secondary school.

Part B

Under Part B of the Education of the Handicapped Act, a handicapped child within the eligible age ranges is entitled to receive a free appropriate public education, a term defined in Section 602 of the Act to include special education and related services. 20 U.S.C. 1401. The term "related services" is defined in Section 602(17) to mean:

... transportation, and such developmental, corrective, and other supportive services (including speech

pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and . . . the early identification and assessment of handicapping conditions in children."

The regulations implement this section by defining each statutorily-specified related service, and by specifying other services, including school health services, as well. Moreover, while catheterization is not specifically listed as a "related service", the "Comment" that follows 34 CFR 300.13 states:

"The list of related services is not exhaustive and may include other developmental, corrective, or supportive services . . . if they are required to assist a handicapped child to benefit from special education."

In addition to the related services requirements outlined above, each public agency must ensure that to the maximum extent appropriate, handicapped children are educated with children who are not handicapped, and that special classes, separate schooling, or other provision of education to handicapped children outside of the regular environment occurs only when the nature or severity of the handicap is such that education in the regular classes cannot be satisfactorily achieved with the use of supplementary aids and services. 20 U.S.C. 1412(5)(B); 34 CFR 300.550.

In light of the above, the Secretary concludes that clean intermittent catheterization is a "related service" as that term is defined in the Education of the Handicapped Act. CIC must be provided when it is required to provide a free appropriate public education, including services in the least restrictive environment, to handicapped children receiving special education. A public agency is not required to provide CIC to a child who is enrolled in a day program when that child is not in school. Nor is the agency required to provide routine medical services, such as laboratory analysis, that may be related to the provision of CIC. (These services are also not required under Section 504.)

Section 504

Under Section 504 and the Department's implementing regulation, public educational agencies are required to provide regular or special education and related aids and services to eligible handicapped children. 34 CFR 104.3(j), 104.3(k)(2). Those handicapped children entitled to services under Section 504

must be provided a free appropriate public education "regardless of the nature or severity of the person's handicap". 34 CFR 104.33(a). Moreover, Section 104.34 of the regulation requires that handicapped persons be educated in the regular educational environment unless this cannot be satisfactorily achieved with the use of supplementary aids and services.

Therefore, the Secretary concludes that, under Section 504, clean intermittent catheterization is a "related service" when it is necessary to ensure the provision of a free appropriate public education, including services in the least restrictive environment, for handicapped children requiring regular or special education.

Judicial Precedent

The limited judicial precedent on catheterization as a required service is consistent with the Secretary's interpretation. See *Tatro v. State of Texas*, 625 F.2d 557 (5th Cir. 1980); *Tokarcik v. Forest Hills School District*, No. 79-338 (W.D. Pa. Oct. 31, 1980); and *Hairston v. Drosick*, 423 F. Supp. 180 (S.D. W. Va. 1976). In the cases decided after publication of regulations under Part B and Section 504, the courts held that CIC is a related service which must be provided to handicapped children. In the case decided before publication of the regulations, the court held that a handicapped child could not be excluded from the regular classroom because she needed CIC.

(20 U.S.C. 1401, 1411-1420; 29 U.S.C. 794)

Dated: January 13, 1981.

Shirley M. Hufstetler,
Secretary of Education.

(FR Doc. 81-1963 Filed 1-16-81; 8:45 am)
BILLING CODE 4000-01-M

DEPARTMENT OF EDUCATION POLICY INTERPRETATION
UNDER P.L. 94-142 AND SECTION 504:
USE OF INSURANCE PROCEEDS

46 FEDERAL REGISTER 83690 (Dec. 30, 1981)

A "hold" on this policy interpretation has been issued by the Reagan Administration, so that the Administration may review the policy interpretation to analyze regulatory burdens and to identify opportunities for de-regulation and possible alternative approaches to achieving program objectives. See 46 FEDERAL REGISTER 19000 (March 27, 1981).

DEPARTMENT OF EDUCATION

Office of Special Education

Office for Civil Rights

34 CFR Part 104 and 300

Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting From Federal Financial Assistance; and Assistance to States for Education of Handicapped Children

AGENCY: Department of Education.

ACTION: Notice of Interpretation.

SUMMARY: The Secretary of Education interprets Part B of the Education of the Handicapped Act, as amended, and Section 504 of the Rehabilitation Act of 1973, as amended, concerning the use of parents' insurance proceeds to pay for required services. It is the Secretary's interpretation that these statutes and their implementing regulations do not permit an educational agency responsible for the education of a handicapped child to require the parents of that child to use private insurance proceeds to pay for required services where the parents would incur financial loss. This interpretation is issued in response to public inquiries regarding Departmental policy on the matter.

EFFECTIVE DATE: This interpretation is expected to take effect 45 days after it is transmitted to Congress. Interpretations are usually transmitted to Congress several days before they are published in the Federal Register. The effective date of interpretations that are subject to the transmittal requirement is changed if Congress takes certain adjournments. Although the interpretation of Section 504 is not subject to this requirement, the Secretary has decided to set its effective date for the same day that the interpretation of Part B of the Education of the Handicapped Act becomes effective. If you want to know the effective date of this interpretation, call or write the Department of Education contact persons.

FOR FURTHER INFORMATION CONTACT:

Ms. Shirley A. Jones, Office of Special Education, Department of Education, Donohoe Building, Room 4030, 400 Maryland Ave. S.W., Washington, D.C. 20202, telephone: (202) 472-7921. Mr. Edward A. Stutman, Office for Civil Rights, Department of Education, Switzer Building, Room 5430, 300 C St. S.W., Washington, D.C. 20202, telephone: (202) 245-0781.

SUPPLEMENTARY INFORMATION:*The Issue*

The issue is whether Part B of the Education of the Handicapped Act, as amended, ("Part B"; 20 U.S.C. 1411-1420) and its regulations (34 CFR Part 300; formerly 45 CFR Part 121a) and Section 504 of the Rehabilitation Act of 1973, as amended ("Section 504"; 29 U.S.C. 794) and its regulations (34 CFR Part 104; formerly 45 CFR Part 84) permit an educational agency responsible for the education of a handicapped child to require the child's parents to file insurance claims and use the proceeds to pay for services that must be provided to the child under Part B and Section 504.

The Interpretation

Both Part B and Section 504 prohibit a public agency from requiring parents, where they would incur a financial cost, to use insurance proceeds to pay for services that must be provided to a handicapped child under the "free appropriate public education" requirements of those statutes. The use of parents' insurance proceeds to pay for services in these circumstances must be voluntary on the part of the parents.

Discussion

Under Section 612(2)(B) of Part B (20 U.S.C. 1412(2)(B)), each participating State must make available to all handicapped children within specified ages a free appropriate public education. "Free appropriate public education" is defined in Section 602(18) of the Education of the Handicapped Act, as amended, (20 U.S.C. 1401(18)) as "special education and related services which are provided at public expense, under public supervision and direction, and without charge. . . ." The requirement to provide these services is implemented in 34 CFR 300.300 *et seq.*

Similarly, the Department's regulations implementing Section 504 require any recipient of Federal financial assistance that operates a public elementary or secondary education program to "provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap." 34 CFR 104.33(a). The provision of a free education is defined as "the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-

handicapped persons or their parents or guardian." 34 CFR 104.33(c).

The Secretary interprets the requirements that a free appropriate public education be provided "without charge" or "without cost" to mean that an agency may not compel parents to file an insurance claim when filing the claim would pose a realistic threat that the parents of handicapped children would suffer a financial loss not incurred by similarly situated parents of non-handicapped children. Financial losses include, but are not limited to, the following:

(1) A decrease in available lifetime coverage or any other benefit under an insurance policy;

(2) An increase in premiums or the discontinuation of the policy; or

(3) An out-of-pocket expense such as the payment of a deductible amount incurred in filing a claim.

Financial losses do not include incidental costs such as the time needed to file an insurance claim or the postage needed to mail the claim.

The statutory and regulatory provisions relating to a free appropriate public education guarantee freedom only from financial loss as described above. Therefore, when the educational agency pays the financial costs related to filing a claim and no other cost (such as those listed above) is imposed, the parent suffers no financial loss. In addition, an agency may insist that parents file a claim when they would incur only minor incidental costs such as the time required to complete the form. The agency may require the parents to file a claim if it ensures that parents do not have to bear even a short-term financial loss. For example, if benefits begin only after a \$50.00 deductible, the agency may insist that the parents file a claim if it pays for the services and the deductible in advance. (20 U.S.C. 1401, 1411-1420; 29 U.S.C. 794)

The responsibility to make available a free appropriate public education does not mean that a public educational agency must use only its own funds for that purpose. An agency may use, whatever State, local, Federal, and private sources of support are available to pay for required services. See 34 CFR 300.301(a) and 34 CFR 104.33(c)(1). Moreover, nothing in the Part B or Section 504 regulations relieves an insurer or similar third party from an otherwise valid obligation to provide or pay for services to a handicapped child. See 34 CFR 300.301(b) and 34 CFR 104.33(c).

HEW POLICY INTERPRETATIONS
UNDER §504 OF THE REHABILITATION ACT:
PROGRAM ACCESSIBILITY, PARTICIPATION OF
THE HANDICAPPED IN CONTACT SPORTS, AND
SCHOOL BOARD MEMBERS AS HEARING OFFICERS

43 Fed. Reg. 36034 (August 14, 1978)

[4110-12]

**DEPARTMENT OF HEALTH,
EDUCATION, AND WELFARE**

Office of the Secretary

**NONDISCRIMINATION IN FEDERALLY ASSISTED
PROGRAMS**

Policy Interpretations

INTRODUCTION

The following four policy interpretations are issued by the Office for Civil Rights under the procedures announced in the *FEDERAL REGISTER* on May 1, 1978, 43 FR 18630. They interpret the Department's regulation issued under section 504 of the Rehabilitation Act of 1973.

DAVID S. TATEL,
Director,
Office for Civil Rights.

AUGUST 8, 1978.

**SECTION 504 OF THE REHABILITATION
ACT OF 1973**

POLICY INTERPRETATION NO. 3

Subject: "Program Accessibility" Requirements.

Policy Interpretation: A recipient is not required to make structural modifications to its existing facilities if its services can be made effectively available to mobility impaired persons by other methods. In selecting from among other methods, recipients must give priority to those that offer handicapped and nonhandicapped persons programs and activities in the same setting. Because of the administrative impossibility of continually determining, on an up-to-date basis, whether mobility impaired individuals will be entitled to services by a given recipient, and for other reasons set forth below, the absence of mobility impaired persons residing in an area cannot be used as the test of whether programs and activities must be made accessible.

Discussion: The Department has been asked by recipients conducting modest programs (e.g., libraries in rural areas, small welfare offices, day care centers and senior citizens centers): (1) Whether they must make structural changes to their buildings to accommodate persons who are mobility impaired; and (2) whether they must make their services accessible to mobility impaired persons even if no such persons are known to live in their service area.

The Section 504 regulation was carefully written to require "program accessibility" not "building accessibility," thus allowing recipients flexibility in selecting the means of compliance. For example, they may arrange for the delivery of their services at al-

ternative sites that are accessible or use aides or deliver services to persons at their homes. The regulation does not require that all existing facilities or every part of an existing facility be made accessible; structural changes are not necessary if other methods are effective in making the recipient's services available to mobility impaired persons. For example, a library building in a rural area with one room and an entrance with several steps can make its services accessible in several ways. It may construct a simple wooden ramp quickly and at relatively low cost. Mobility impaired persons may be provided access to the library's services through a bookmobile or by special messenger service or clerical aid or any other method that makes the resources of the library "readily accessible." However, recipients are required to give priority to methods that offer handicapped and nonhandicapped persons programs and activities in the same setting.

There is an additional option for recipients that have fewer than 15 employees and that provide health, welfare, or other social services. If such a recipient finds, after consulting with a handicapped person seeking services, that only a significant alteration to its existing facilities will make its program accessible, the recipient may refer the handicapped person to another provider of the same services that is accessible. The referring recipient has the obligation to determine that the other provider is accessible and is willing to provide the services.

The section 504 regulation does not condition the requirement of "program accessibility" upon handicapped persons residing in the recipient's service area. Such a condition would be administratively unworkable. It would require the establishment of arbitrary geographic boundaries for each recipient's service area, the identification of all handicapped persons in that area and periodic surveys to determine whether handicapped persons have moved into or out of the service area. It would also ignore the needs of those persons who temporarily become mobility impaired or those mobility impaired persons who visit a service area. Moreover, mobility impaired persons may decide not to settle in a community because its services are not accessible.

The Department concludes, as it did when the section 504 regulation was adopted, that because the "standard (for program accessibility) is flexible" the regulation "does not allow for waivers." (See "Authority" section below).

Coverage: This policy interpretation applies to any public or private institution, person, or other entity that receives or benefits from HEW financial

assistance. For further information, see definition of "recipient" at 45 CFR section 84.3(f).

Authority: Regulation issued under section 504 of the Rehabilitation Act of 1973, 45 CFR § 84.22 and appendix A.

Section 84.22:

(a) **Program accessibility.** A recipient shall operate each program or activity to which this part applies so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) **Methods.** A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of § 84.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate.

(c) **Small health, welfare, or other social service providers.** If a recipient with fewer than 15 employees that provides health, welfare, or other social services finds, after consultation with a handicapped person seeking its services, that there is no method of complying with paragraph (a) of this section other than making a significant alteration in its existing facilities, the recipient may, as an alternative, refer the handicapped person to other providers of those services that are accessible.

Appendix A—Section by Section Analysis, Subpart C—Program Accessibility.

Several commenters expressed concern about the feasibility of compliance with the program accessibility standard. *The Secretary believes that the standard is flexible enough to permit recipients to devise ways to make their programs accessible short of extremely expensive or impractical physical changes in facilities. Accordingly, the section does not allow for waivers.* The Department is ready at all times to provide technical assist-

ance to recipients in meeting their program accessibility responsibilities. For this purpose, the Department is establishing a special technical assistance unit. Recipients are encouraged to call upon the unit staff for advice and guidance both on structural modifications and on other ways of meeting the program accessibility requirements. . . . (Emphasis added.)

Further, it is the Department's belief, after consultation with experts in the field, that outside ramps to buildings can be constructed quickly and at a relatively low cost. Therefore, it will be expected that such structural additions will be made promptly. . . . (Emphasis added.)

SECTION 504 OF THE REHABILITATION ACT OF 1973

POLICY INTERPRETATION NO. 4

Subject: Carrying Handicapped Persons to Achieve Program Accessibility.

Policy Interpretation: Carrying is an unacceptable method for achieving program accessibility for mobility impaired persons except in two cases. First, when program accessibility can be achieved only through structural changes, carrying may serve as an expedient until construction is completed. Second, carrying will be permitted in manifestly exceptional cases if carriers are formally instructed on the safest and least humiliating means of carrying and the service is provided in a reliable manner.

Discussion: The section 504 regulation requires that federally assisted programs and activities be "readily accessible" to handicapped persons. A program or activity will be judged "readily accessible" only if it is conducted in a building and room that mobility impaired persons can enter and leave without assistance from others. Carrying requires such assistance and is therefore unacceptable.

Carrying may also be undependable (e.g., when college students or employees are expected to volunteer) and often hazardous (e.g., when carriers are untrained or when the carrying is to occur on poorly illuminated or narrow stairs). It may humiliate the handicapped person by dramatizing his or her dependency and creating a spectacle. Its use is therefore inconsistent with section 504's critical objective of encouraging handicapped persons to participate in programs and activities.

The Department recognizes that carrying may be necessary in the following cases:

(1) The section 504 regulation requires "program accessibility" for handicapped persons and suggests a variety of methods for attaining compliance that can be implemented within 60 days. However, if "program accessibility" can be achieved only

through "alterations of existing facilities (or) construction of new facilities," the construction must be completed "as expeditiously as possible," but in no event, later than June 3, 1980. Although recipients are not required to provide "program accessibility" during the period of construction, the Department encourages recipients to develop an interim expedient that may be carrying.

(2) Carrying is also acceptable in manifestly exceptional cases. For example, a university has properly maintained that the structural changes and devices necessary to adapt its oceanographic vessel for use by mobility impaired persons are prohibitively expensive, or unavailable. Carrying, under this exception, must be provided in a manner that attempts to overcome its shortcomings. For example, carriers must be formally instructed on the safest and least humiliating means of carrying and the service must be provided in a reliable manner.

Coverage: This policy interpretation applies to any public or private institution, person, or other entity that receives or benefits from HEW financial assistance. For further information, see definition of "recipient" at 45 CFR § 84.3(f).

Authority: Regulation issued under section 504 of the Rehabilitation Act of 1973, 45 CFR §§ 84.22 (a), (b) and (d).

Section 84.22:

(a) **Program Accessibility.** A recipient shall operate each program or activity to which this part applies so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) **Methods.** A recipient may comply with the requirement of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of § 84.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs and activities to handicapped persons

in the most integrated setting appropriate.

(d) **Time period.** A recipient shall comply with the requirement of paragraph (a) of this section within 60 days of the effective date of this part except that where structural changes in facilities are necessary, such changes shall be made within 3 years of the effective date of this part, but in any event as expeditiously as possible.

SECTION 504 OF THE REHABILITATION ACT OF 1973

POLICY INTERPRETATION NO. 5

Subject: Participation of Handicapped Students in Contact Sports.

Policy Interpretation: Students who have lost an organ, limb, or appendage but who are otherwise qualified, may not be excluded by recipients from contact sports. However, such students may be required to obtain parental consent and approval for participation from the doctor most familiar with their condition. If the school system provides its athletes with medical care insurance for sickness or accident, it must make the insurance available without discrimination against handicapped athletes.

Discussion: The Department has received several complaints that students have been denied an opportunity to participate in contact sports solely because they have lost an organ, limb, or appendage. The regulation's requirement that handicapped students be provided an equal opportunity to participate in physical education and athletics programs extends to contact sports. The exclusion from contact sports of students who have lost an organ, limb, or an appendage (e.g. a kidney, leg, or finger) but who are otherwise qualified is a denial of equal opportunity. It denies participation not on the basis of ability but because of a handicap.

A recipient cannot assume that such a child is too great a risk for physical injury or illness if permitted to participate in contact sports. However, a child may be required to obtain parental consent and approval for participation from the doctor most familiar with his or her condition.

If the recipient provides its athletes with medical care insurance for sickness or accident, it must make the insurance available without discrimination against handicapped athletes.

Coverage: This policy interpretation applies to any public or private institution, person, or other entity that receives or benefits from HEW financial assistance. For further information see definition of "recipient" at 45 CFR § 84.3(f).

Authority: Regulation issued under section 504 of the Rehabilitation Act of 1973, 45 CFR § 84.37(c)(1).

Section 84.37(c)(1):

(c) *Physical education and athletics.*
 (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

**SECTION 504 OF THE REHABILITATION
 ACT OF 1973**

POLICY INTERPRETATION NO. 6

SUBJECT: School board members as hearing officers.

POLICY INTERPRETATION: School board members may not serve as hearing officers in proceedings conducted to resolve disputes between parents of handicapped children and officials of their school system.

DISCUSSION: The section 504 regulation requires school districts to establish a "system of procedural safeguards" to protect against errors in the educational programs developed for handicapped students. One requirement of that system is an "impartial hearing . . . and a review procedure" through which a parent may contest the evaluation and placement of his or her child.

Recipients have asked whether school board members may serve as the hearing or reviewing authority in their own school district. The Department has concluded that this practice is inconsistent with the regulation's requirement of "impartial" proceed-

ings. School board members have a clear interest in the outcome of the hearing. For example, determinations adverse to the parents will often avoid additional expenditures by the board. Also, the school board has hired, and therefore expressed confidence in, the judgment of the professionals challenged in the hearing. Moreover, since the Department will generally not review individual placement and other educational decisions of a school district if the "system of procedural safeguards" is in place, every precaution must be taken to ensure that those procedures operate fairly.

This interpretation is also supported by our commitment to coordinate section 504 procedural safeguards with those established by the Office of Education under the Education of the Handicapped Act. The regulations issued under that statute, as interpreted by the Office of Education, bar school board members from serving as hearing officers in their school system.

COVERAGE: This policy interpretation applies to any public or private institution, person, or other entity that receives or benefits from HEW financial assistance. For further information, see definition of "recipient" at 45 CFR 84.3(f).

AUTHORITY: Regulation issued under section 504 of the Rehabilitation Act of 1973, 45 CFR 84.36 and Appendix A thereto.

Section 84.36: A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an

opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

Appendix A, Subpart D (Fifth Paragraph): It is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the school district complies with the "process" requirements of this subpart (concerning identification and location, evaluation, and due process procedures) . . .

Regulations Issued Under the Education of the Handicapped Act, 45 CFR 121a.507 and Appendix A Thereto

Section 121a.507: (a) A hearing may not be conducted:

(1) By a person who is an employee of a public agency which is involved in the education or care of the child, or

(2) By any person having a personal or professional interest which could conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer . . .

Appendix A, Subpart E ("Response" to "Comment" on Section 121a.507): (A) parent of the child in question and school board officials are disqualified under § 121a.507.

[FR Doc. 78-22612 Filed 8-11-78, 8:45 am]

NEW POLICY INTERPRETATIONS
UNDER §504 OF THE REHABILITATION ACT:
DISCRIMINATION PRIOR TO EFFECTIVE DATE
OF REGULATIONS AND STATUTE OF
LIMITATIONS FOR SUCH DISCRIMINATION

43 Fed. Reg. 18630 (May 1, 1978)

[4110-12]

DEPARTMENT OF HEALTH,
EDUCATION AND WELFARE

Office of the Secretary

NONDISCRIMINATION IN FEDERALLY ASSISTED
PROGRAMS

Policy Determinations

INTRODUCTION

The Office for Civil Rights will hereafter publish all major policy determinations in the Federal Register and systematically provide copies to organizations representing beneficiaries and recipients of Federal financial assistance.

Policy determinations will fall into one of three categories:

1. *Policy Interpretations* will clarify and explain regulatory provisions.

2. *Procedural Announcements* will outline the specific procedures recipients must follow to comply with regulatory provisions or the procedures this office will follow to obtain compliance.

3. *Decision Announcements* will illustrate how this office has applied regulatory provisions to specific fact patterns developed through investigations.

Following are the first five policy determinations issued in accordance with this procedure. Three relate to Title IX of the Education Amendments of 1972 which prohibits discrimination on the basis of sex; two relate to Section 504 of the Rehabilitation Act of 1973 which prohibits discrimination on the basis of handicap.

Dated: April 26, 1978.

DAVID S. TARR,
Director,
Office for Civil Rights.

SECTION 504 OF THE REHABILITATION
ACT OF 1973

Coverage: The following two policy interpretations apply to any public or private institution, person, or other entity that receives or benefits from HEW financial assistance. For further information see definition of "recipient" at 45 CFR 84.3(f).

POLICY INTERPRETATION NO. 1

Subject: Discrimination that occurred before the effective date of the regulation.

Policy interpretation: The Office for Civil Rights will investigate complaints of alleged discrimination that occurred after September 26, 1973, the date section 504 became law, and prior to June 3, 1977, the date the section 504 regulation became effective, if those complaints charge violations of the statute which do not require for their resolution the interpretative language of the regulation.

Discussion: Section 504 of the Rehabilitation Act of 1973 became law on September 26, 1973. The implementing regulation became effective on June 3, 1977. It would therefore be unreasonable for the Department to investigate pending complaints alleging violations of section 504 occurring between September 26, 1973 and June 3, 1977 unless a clear violation of the statute is at issue.

The question to be answered on a case-by-case basis is whether the language of the statute provides notice that the challenged policy or practice is unlawful. For example, the exclusion of qualified handicapped students from a college or university or the prohibition of tape recorders in classrooms by students whose handicap impairs their ability to take notes, will be considered violations of section 504. Discrimination against a qualified applicant for employment will be considered a violation of section 504 if adjustments would not have been needed to accommodate the applicant's handicap. However, failure to provide auxiliary aids in colleges and universities or to reasonably accommodate the needs of handicapped applicants for employment will not be considered unlawful unless it occurs after June 3, 1977.

This policy interpretation has no effect on obligations established by the Federal Architectural Barriers Act which predates Section 504.

Authority: Section 504, Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794).

Section 504: No otherwise qualified handicapped individual in the United States... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

POLICY INTERPRETATION NO. 2

Subject: Application of the 180-day limitations period to discrimination occurring before the effective date of the regulation.

Policy interpretation: The 180-day limitations period for complaints of discrimination will not be applied to acts of discrimination occurring prior to the effective date of the regulation.

Discussion: The regulation requires that complaints of discrimination be filed within 180 days of the unlawful act. This requirement was not imposed until the effective date of the regulation (June 3, 1977), and it will therefore not apply to complaints alleging discrimination that occurred before the effective date of the regulation but after the effective date of the statute (September 26, 1973). For these complaints, the 180-day limitations period will begin to run from June 3, 1977. Such complaints, however, will

NOTICES

be investigated only if they allege clear violations of the statute. See Section 504 Policy Interpretation No. 1.

Authority: Regulation issued under Section 504 of the Rehabilitation Act of 1973 and Title VI of the Civil Rights Act of 1964, 45 CFR 84.61 and 80.7(b).

Section 84.61: The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 80.6, 80.10 and Part 81 of this Title.

Section 80.7(b): (b) *Complaints.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may file himself or by a representative filed with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.

1978 DEC 78 11742 Filed 4 28 78; 8:45 am

BUREAU OF INDIAN AFFAIRS (BIA) PROPOSED RULES:
PROVISION OF SPECIAL EDUCATION AND RELATED SERVICES
UNDER P.L. 94-142 TO INDIAN CHILDREN IN SCHOOLS
OPERATED BY OR UNDER THE AUTHORITY OF THE BIA

45 FEDERAL REGISTER 64472 (SEPTEMBER 29, 1980)

230.

App. B-212

DEPARTMENT OF THE INTERIOR**Bureau of Indian Affairs****25 CFR Part 31k****Special Education**

September 23, 1980.

AGENCY: Bureau of Indian Affairs.**ACTION:** Proposed rule.

SUMMARY: Notice is hereby given that it is proposed to add a new Part 31k to Subchapter E, Chapter I of Title 25 of the Code of Federal Regulations. These proposed rules establish standards for the provision of special education and related services under the Education for All Handicapped Children Act of 1975, as amended, (P.L. 94-142 Act of November 29, 1975, 89 Stat. 773) to Indian children in schools operated by or under the authority of the Bureau of Indian Affairs (BIA).

DATES: Comments must be received on or before November 28, 1980.

ADDRESS: Mail written comments to: U.S. Department of the Interior, Bureau of Indian Affairs, Office of Indian Education Programs, Attention: Earl Barlow, Director, 18th and C Streets, N.W., Room 3510, Washington, D.C. 20240.

FOR FURTHER INFORMATION CONTACT: Charles Cordova, Chief, Division of Exceptional Education, Office of Indian Education Programs, Bureau of Indian Affairs, 18th and C Streets, N.W., Room 4651, Washington, D.C. 20240, (202) 343-4071.

SUPPLEMENTARY INFORMATION: The authority for issuing these rules is contained in 5 U.S.C. 301; 25 U.S.C. 2 and 9. This notice is published in exercise of the authority delegated by the Secretary of Interior to the Assistant Secretary for Indian Affairs by 209 DM 8.

The proposed rules establish criteria for governing the operation of special education programs for handicapped children enrolled or eligible for enrollment in BIA operated and/or funded schools. These proposed rules thus apply to all schools operated by or under the authority of the Department of the Interior that receive financial assistance from the U.S. Department of Education, generally under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 708 and its implementing regulation (45 CFR 84) and under Part B of the Education of the Handicapped Act, as amended, 20 U.S.C. 1411-1420 and its implementing regulations (45 CFR 100b.121a). Accordingly, this regulation represents an effort to combine in a single document all of the

Federal requirements directly addressed to the identification of and provision of educational services to handicapped children in such schools. The regulation is intended to establish a singly comprehensive set of standards for ensuring that all handicapped children enrolled in BIA operated and/or funded schools are provided a free appropriate public education in the least restrictive educational environment appropriate to their needs, consistent with their rights and related procedural safeguards.

The primary author of this document is Charles G. Cordova. Telephone Number: (202) 343-4071.

The Department of Interior has determined that this document is not a significant rule and does not require a regulatory analysis under Executive Order 12044 and 43 CFR, Part 14.

It is proposed to add a new Part 31k to Subchapter E, Chapter I of Title 25 of the Code of Federal Regulations to read as follows:

PART 31k—SPECIAL EDUCATION**Subpart A—General**

Sec.

31k.1 General responsibility.

31k.2 Enrollment in early childhood programs.

31k.3 Children of ages eighteen through twenty-one.

31k.4 Equal educational opportunity.

31k.5 Definitions.

Subpart B—Identification and Evaluation of Handicapped Children

31k.11 Child find.

31k.12 Child find—elements.

31k.13 Register of children.

31k.14 General entry screening.

31k.15 Waiver of general entry screening.

31k.16 Screening personnel.

31k.17 Report of general entry screening.

31k.18 Individual evaluations.

31k.19 Evaluation procedures.

31k.20 Individual evaluation objectives.

31k.21 Formation of multi-disciplinary evaluation teams.

31k.22 Composition of multi-disciplinary evaluation teams.

31k.23 Content of individual evaluations.

31k.24 Test administration.

31k.25 Location of evaluation.

31k.26 Multi-disciplinary evaluation team procedures.

31k.27 Emergency evaluation and placement.

31k.28 Independent educational evaluation.

31k.29 Additional procedures for evaluating specific learning disabilities.

Subpart C—Provision of Special Education and Related Services

31k.30 Free, appropriate public education.

31k.31 Individualized education program.

31k.32 Content of individualized education program (IEP).

31k.33 IEP development.

31k.34 Placement recommendation in the IEP.

Sec.

31k.35 Approval of IEP and placement recommendation.

31k.36 Parent participation.

31k.37 IEP implementation and placement.

31k.38 IEP revision, review of placement.

31k.39 Re-evaluation.

31k.40 Extended school year services.

31k.41 Outcome goals.

31k.42 Related services.

31k.43 Non-academic and extracurricular services.

31k.44 Physical education and athletics.

31k.45 Discipline.

31k.46 Geographic accessibility.

31k.47 Architectural barriers and program accessibility.

31k.48 Handicapped children in private schools placed or referred by agencies.

31k.49 Handicapped children in private schools placed by parents.

Subpart D—Procedural Safeguards

31k.51 Full and effective notice.

31k.52 Parental consent.

31k.53 Rights of handicapped children.

31k.54 Access rights.

31k.55 Confidentiality of information.

31k.56 Surrogate parents.

31k.57 Conciliation.

31k.58 Initiation of hearings.

31k.59 Hearing officers.

31k.60 Impartial hearing officers.

31k.61 Hearing rights.

31k.62 Hearing decision: Appeal.

31k.63 Administration appeal: Impartial review.

Subpart E—Personnel

31k.64 Appointment of special education coordinator.

31k.65 In-service training.

31k.66 Qualification of staff.

Subpart F—School Administration

31k.70 Assurance of compliance.

31k.71 Self-evaluation.

31k.72 Comparability of facilities.

31k.73 Non-discrimination in administration of schools.

Subpart G—Responsibilities of the Division

31k.74 The division.

31k.75 Monitoring.

31k.76 Complaint procedures.

31k.77 Use of available funds.

31k.78 Children for whom the division of social services has accepted responsibility.

31k.79 Cooperative agreements.

31k.80 Vocational education coordinator.

31k.81 BIA advisory committee on exceptional education.

31k.82 Further guidelines and directives.

Authority: 5 U.S.C. 301; 25 U.S.C. 2 and 9.

Subpart A—General

§ 31k.1 General responsibility.

(a) Schools are responsible for providing a free appropriate public education to all handicapped Indian children enrolled in a school operated by or funded by the Bureau of Indian Affairs (BIA) who are between the ages of three and twenty-one. Children whose third birthday occurs after the

beginning of a regular school year but before the end of the first full week of January or whose twenty-second birthday occurs during the course of the regular school year shall be regarded as eligible children for the entire school year.

(b) The responsibility to ensure the provision of a free appropriate public education continues unabated regardless of whether the handicapped child is provided special education and related services:

- (1) By a school directly;
 - (2) Through a contract entered into by the school with a public or private agency;
 - (3) By an educational cooperative of which the school is a member;
 - (4) By an approved public or non-public school program (following placement or referral);
- until a child successfully completes a secondary school program, voluntarily withdraws or attains the age of twenty-two years.

§ 31k.2 Enrollment in early childhood education programs.

A child of age three or four shall be entitled to all rights given to children and parents by this part. Schools and agencies which do not have an Early Childhood Education Program should consider alternative placements as outlined in § 31k.35.

§ 31k.3 Children of ages eighteen through twenty-one.

A child of ages eighteen through twenty-one shall be entitled to all of the rights given to children and parents by this part.

§ 31k.4 Equal educational opportunity.

Each school must provide full educational opportunity to all handicapped children, aged three through twenty-one no later than September 1, 1980.

§ 31k.5 Definitions.

(a) "Agency" means an organizational unit of the Bureau which provides direct services to the governing body or bodies of one or more specified Indian tribes. The term includes Bureau Area offices only with respect to off-reservation boarding schools, cooperative schools, and tribally-operated contract schools located in the area for which the Director has not designated an Agency.

(b) "Agency Superintendent for Education" means the Bureau official in charge of Bureau education programs and functions in an Agency, and who report to the Director, Office of Indian Education Programs (OIEP).

(c) "Approved public or non-public school" means either a public school

operated by a local educational agency, intermediate educational unit or other public agency (as those terms are defined at 45 CFR 121a.7, 8, 11) of a state which receives funds under Part B of the Education of the Handicapped Act, as amended (20 U.S.C. 1411-1420) pursuant to a current annual program plan approved by the Commissioner of Education (pursuant to 45 CFR 121a.113) or a non-public school located in such state determined by the state educational agency to be in full compliance with all applicable state and Federal special education requirements.

(d) "Area Education Program Administrator" means the Bureau official in charge of Bureau Education programs and functions in a Bureau Area Office and who reports to the Director.

(e) "Assistant Secretary" means the Assistant Secretary of Indian Affairs, Department of the Interior, or his/her designee.

(f) "Blind" means the possession of a central visual acuity of 20/200 or less in the better eye with correcting glasses, or a peripheral field of vision so contracted that its widest diameter is less than 20%.

(g) "Boarding school" means a Bureau school offering residential care and support services as well as an academic program.

(h) "Bureau" means the Bureau of Indian Affairs of the Department of the Interior.

(i) "Child identification" means the identification, location, and individual evaluation of handicapped children.

(j) "Cooperative agreements" means an agreement between schools operated or funded by the BIA and state and local education agencies for the provision of special education and related services to handicapped children enrolled or eligible to be enrolled in the BIA school.

(k) "Counseling services" means services provided by qualified social workers (with training as counselors), psychologists, guidance counselors, or other qualified personnel.

(l) "Director" means the Director, Office of Indian Education Programs.

(m) "The Division" means the Division of Exceptional Education, Office of Indian Education Programs, Bureau of Indian Affairs, Department of the Interior.

(n) "Deaf" means a hearing impairment which is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, and which adversely affects a child's education performance.

(o) "EHA" means Part B of the Education of the Handicapped Act as amended by the Education for All

Handicapped Children Act of 1975 (Pub. L. 94-142), 20 U.S.C. 1411-1420, and the regulations issued by the U.S. Department of Health, Education, and Welfare at 45 CFR 100b; 121a.

(p) "Handicapped child" means a child evaluated in accordance with the requirements of this Part who is determined to be emotionally disturbed, learning disabled, mentally retarded, hard of hearing, deaf, deaf-blind, speech impaired, severe language disordered, visually impaired, multihandicapped, orthopedically impaired, otherwise health impaired or handicapped, and who requires special education and related services.

(q) "Hard of hearing" means a hearing impairment, whether permanent or fluctuating, which adversely affects a child's educational performance but which is not included under the definition of "deaf" in this section.

(r) "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the Agency responsible for the education of the child in question.

(s) "Individualized Education Program" (IEP) means the written individualized education program for a handicapped child which sets forth the child's present level of education performance, determines annual goals and short term instruction objectives, and describes the specific special education and related services to be provided to the child in the least restrictive environment consistent with all of the requirements of § 31k.32-37 of this part.

(t) "Indian" means a person who is a member of an Indian tribe.

(u) "Indian Tribe" means any Indian Tribe, Band, Nation, Rancheria, Pueblo, Colony or Community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) which is recognized by the Assistant Secretary as eligible for the special programs and services provided through the Bureau to Indians because of their status as Indians.

(v) "Individual or group Intelligent Quotient (IQ) test" means any group or individual test, device, or measure which purports, or is used, to assess a child's current or future mental abilities; capacity; intellectual functioning; retarded intellectual development or aptitude, but does not include achievement tests or adaptive behavior scales.

(w) "In-service training" means any training other than that received by an

individual in a full-time program which leads to a degree.

(x) "Least restrictive environment" means the educational placement of a handicapped child.

(y) "Major body system" means any of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive, genitourinary; hemic and lymphatic; skin; and endocrine.

(z) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(aa) "Mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affects a child's educational performance.

(bb) "Multi-handicapped" means concomitant impairments (such as mentally retarded-blind, mentally retarded-orthopedically impaired, deaf-blind, etc., but not including speech impaired), the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments.

(cc) "Native language" when used with reference to a person of limited English-speaking ability, means the language normally used by that person, or in the case of a child, the language (including sign language and braille notation) normally used by the parents of the child.

(dd) "Orthopedically impaired" means a severe orthopedic impairment which adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of member, etc.), impairments caused by disease (e.g., polio-myelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns which cause contractures).

(ee) "Other health impaired" means limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, which adversely affects a child's educational performance.

(ff) "Parent" means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent provided

that the rights and responsibilities of a parent established by this Part shall be exercised directly by a handicapped child who attains the age of eighteen years unless such child has been determined to be in continuing minority by a court of the state or tribal court.

(gg) "Parental consent" is fully informed parental consent as defined in § 31k.52 of this Part.

(hh) "Parent counseling and training" means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(ii) "Physical education" means the development of physical and motor fitness; fundamental motor skills and patterns; and skills in aquatics, dance and individual and group games and sports. The term includes special physical education, adapted physical education, movement education and motor development.

(jj) "Related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(kk) "School" means an educational or residential center operated by or under contract with the Bureau of Indian Affairs offering services to Indian students under the authority of a local school board and the direction of a local school supervisor. A school may be located on more than one physical site. The term "school", unless otherwise specified, is meant to encompass day schools, boarding schools, previously private schools, cooperative schools, and contract schools as those terms are commonly used. The term "school" shall also encompass private schools/facilities/institutions, with which the Bureau of Indian Affairs may contract for services to handicapped Indian children.

(ll) "Section 504" means section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 706 and the regulation issued by the U.S. Department of Health, Education, and Welfare at 45 CFR Part 84.

(mm) "Seriously emotionally disturbed" means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which

adversely affects educational performance including:

(1) An inability to learn which cannot be explained by intellectual, sensory, or health factors;

(2) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(3) Inappropriate types of behavior or feelings under normal circumstances;

(4) A general pervasive mood of unhappiness or depression; or

(5) A tendency to develop physical symptoms or fears associated with personal or school problems.

The term includes children who are autistic or schizophrenic. The term does not include children who are socially maladjusted, unless it is determined that they are emotionally disturbed.

(nn) "Special education" means specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and the instruction in hospitals and institutions.

(oo) "Special education coordinator" means the qualified full-time employee of an Area/Agency responsible for ensuring that all requirements of this part are complied with by the schools within the jurisdiction of the Area/Agency.

(pp) "Specific learning disabled" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an impaired ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, or mental retardation, or emotional disturbance, or of environmental, cultural, or economic disadvantage.

(qq) "Speech impaired" means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, which adversely affects a child's educational performance.

(pp) "Supervisor" or "school supervisor" means the individual in the position of ultimate authority at any school.

(rr) "Trially operated contract school" means a school (other than a public school) which is financially assisted under a contract with the Bureau.

(ss) "Visually impaired" means a visual impairment which, even with correction, adversely affects a child's educational performance. This term includes partially seeing, but not fully blind children.

(tt) "Vocational education" means organized educational programs which are directly related to the preparations of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

Subpart B—Identification and Evaluation of Handicapped Children

§ 31k.11 Child find.

Each agency must continually seek out, identify and locate every child within its jurisdiction between the ages of birth and twenty-two years who is suspected of being a handicapped child in need of special education and related services. Off-reservation boarding schools shall confine child find activities to the in-school identification described in § 31k.12(c) of this Part. A formal child find effort must be conducted at least once each school year and must include procedures to identify children:

- (a) Enrolled in a regular education program operated by the schools of the agency;
- (b) Enrolled in a pre-school or day-care program on or near the reservation;
- (c) Currently out-of-school, including dropouts and excluding children who have graduated or otherwise successfully completed programs.

§ 31k.12 Child find—Elements.

Each agency shall, at a minimum, ensure that each school singly, or in concert with another school:

- (a) Conduct a formal community survey (by telephone, mail, door-to-door or through any other effective method(s)) of children of all ages to identify children who may be in need of special education services.
- (b) Regularly present or distribute information at tribal government or agency meetings, tribal fairs, chapter/district meetings, etc.
- (c) Establish a system of in-school identification by which each local supervisor refers, for an individual evaluation, children whose academic performance, attendance, or other behavior indicates the possibility of a physical or mental impairment.
- (d) Establish a procedure by which child identification data is regularly collected from the Indian Health Service, local Headstart programs, day care facilities, group homes, local public and non-public schools, the state

education agency (of the state in which the school is located), tribal agencies and organizations and any other appropriate education, health, welfare or social service organization in the community served by the school. A formal procedure for the exchange of information between the State Organizational Unit conducting the Early Periodic Screening, Diagnosis and Treatment Program, (mandated by Title XIX of the Social Security Act), for the state in which the school is located and the Agency in which the school is located shall be established within 180 days from the effective date of this part.

(e) Publish public information articles and programs in local media, including announcements of times, dates and places of free orientation workshops and free screening.

(f) Initiate annual community-wide communication to all parents to describe the special education which is available and to accept referrals of any child for evaluation. Such communication shall emphasize the availability of programs and services for school age children.

§ 31k.13 Register of children.

Each school shall maintain a current register of handicapped children within its jurisdiction. The following information for each child shall be included:

- (a) Name of child;
- (b) Address and telephone number;
- (c) Date of birth;
- (d) Full name of parent(s);
- (e) Date referral received;
- (f) Date of evaluation;
- (g) Date of IEP meeting;
- (h) Date of placement;
- (i) Date(s) of required parental consents; and
- (j) Handicapped condition.

§ 31k.14 General entry screening.

Each school shall participate in a screening program for all newly enrolled children in the school. Such screening shall be conducted by the Agency serving the school in order to identify those children who should be referred for a full individual evaluation. The general entry level screening shall consist of the following elements appropriately adapted for use with children of his/her particular age.

(a) Information from parents, through interviews, questionnaires, or other formal and informal techniques, including:

- (1) the age at which developmental milestones were attained.
- (2) existence of possible need for special education.
- (3) results of previous assessments and evaluations.

(4) history of placement in special education programs.

(5) history of treatment received for disabilities, and

(6) current description of the child and other medical history.

(b) An appropriate vision screening.

(c) An appropriate hearing screening.

(d) A screening, separately and in integration, of the child's visual, auditory and motor functioning in practical tasks and activities.

(e) A screening of the child's language functioning.

§ 31k.15 Waiver of general entry screening.

The general entry screening may be waived if the parents arrange at their expense for the results of an equivalent screening as determined by the school or if an equivalent screening in the opinion of the school has been completed during the preceding six months and has been made available to the school.

§ 31k.16 Screening personnel.

The school shall utilize screening personnel who are certified, licensed, or qualified to do the specific screening which is being performed.

§ 31k.17 Report of general entry screening.

Within 10 days of the completion of the screening the school shall inform the parents of the child of the results of the general entry screening and of the opportunity for the parents to discuss the results with the appropriate school personnel. The screening report shall note any difficulties which were observed during the screening in the child's cognitive, social, or emotional functioning. The child's parents shall be notified at once of any immediate illness or danger to the child discovered by the screening process, and of the procedures the school will follow to insure the child's safety. Where the results of the general entry screening indicate a reasonable likelihood that a child has a need of special education, the results of the screening shall be fully discussed with the child's parents and current or prospective teacher. If the child is involved in an early childhood program at the time of the screening, the results shall be discussed fully with the child's early childhood teacher(s).

§ 31k.18 Individual evaluations.

(a) An individual evaluation must be proposed for parental consent for any child who is suspected of being a handicapped child and in need of special education and related services.

(b) An individual evaluation shall also be conducted if:

(1) A parent challenges, through a due process hearing, a decision made by a school to discontinue further child identification activities (i.e., not propose an individual evaluation) pursuant to this Part;

(2) A significant change in educational placement of a child is proposed by either the school, or the parent, or both;

(3) A child is currently enrolled in a special education program whose last individual evaluation occurred three or more years ago;

(4) It is requested in writing by the handicapped child's teacher, the school supervisor, or by the Special Education Coordinator;

(5) A parent challenges a decision by a school to deny an individual evaluation.

§ 31k.19 Evaluation procedures.

(a) Reasonable effort must be made by the school to obtain parental consent. If, after twenty days from the date the parent is notified of the proposed evaluation, the parent has denied or failed to give approval for the individual evaluation, the school shall either:

(1) Determine that it erred in proposing the individual evaluation; or

(2) Commence the override procedure set forth in Section 31k.59 of this part.

(b) Each school shall insure that the parents of each child referred for an evaluation, as well as the child, who is at least twelve (as a matter of right) or who is younger than twelve when appropriate, have an opportunity to meet with the evaluation personnel of the Agency prior to the date of the evaluation to discuss the reasons for the referral and the nature of the evaluation, including, with parental approval, the possibility of a home visit.

(c) A child who, at the time of referral for evaluation, was in the regular education program, shall remain in that regular education program, unless the school or the child's parents submit a written statement showing that the child's remaining in such program endangers the health or safety of the child or substantially disrupts such program for other children. If the showing is made, the school supervisor may approve a temporary change in placement (i.e., to a special education setting other than the regular classroom) on an emergency basis in accordance with § 31k.27 of this part.

§ 31k.20 Individual evaluation objectives.

The objectives of an individual evaluation are to:

(a) Determine whether a child is handicapped;

(b) Diagnose and evaluate the nature and extent of the effect of such

impairment or condition on the educational performance of the child;

(c) Assess the need for special education and related services.

§ 31k.21 Formation of multi-disciplinary evaluation teams.

(a) The School Supervisor, or designee, will be responsible for the overall conduct of the individual evaluation and shall collect and review all pertinent information regarding the child to be evaluated.

(b) The Special Education Coordinator shall coordinate the selection of a multi-disciplinary evaluation team for the conduct of the evaluation.

§ 31k.22 Composition of multi-disciplinary evaluation teams.

The multi-disciplinary evaluation team shall be composed of certified persons appropriate to a complete assessment of the suspected disability. In all cases the classroom teacher (or other instructional staff member) familiar with the child and a person knowledgeable with respect to the suspected disability must be included on the team.

§ 31k.23 Content of individual evaluation.

Each individual evaluation must include:

(a) An assessment of the child's educational status which includes:

(1) History of the child's education;

(2) Comparison of the level of educational attainment of the child with the achievement of other children of his/her age group.

(b) An assessment by a teacher who has recently taught or is currently teaching the child in a classroom or other teaching situation which includes:

(1) An analysis of the child's performance with a comparison of those abilities to the tasks which are contained in the regular education program;

(2) A statement of school readiness, functioning or achievement; description of the child's behavioral adjustment; and

(3) A statement of the child's attentional capacity, motor coordination, activity levels and patterns, communication skills, memory and social relations with groups, peers, and adults.

(c) When deemed necessary:

(1) A comprehensive health assessment by a physician which identifies medical problems that may affect the child's education, such as:

(i) Physical constraints;

(ii) Chronic illness;

(iii) Neurological and sensory deficits;

(iv) Developmental dysfunction and needs;

(v) Emotional and psychological condition; and

(vi) Nutritional state.

(2) An assessment by a psychologist, including an individual psychological examination culminating in specific recommendations, based upon the child's:

(i) Developmental and social history;

(ii) Observation of the child in familiar surroundings (such as a classroom);

(iii) Sensory;

(iv) Motor;

(v) Language;

(vi) Perceptual;

(vii) Attention span;

(viii) Cognitive;

(ix) Affective;

(x) Attitudinal;

(xi) Self-image;

(xii) Interpersonal;

(xiii) Behavioral; and

(xiv) Interest and vocational factors, in regard to their maturity, integrity and dynamic interaction within the educational context.

(3) An assessment by a nurse, social worker or a guidance counselor of pertinent family history and home situation factors including a description of the family and individual developmental history, an estimate of adaptive behavior at home, in the neighborhood and in local peer groups. Estimates of adaptive behavior shall be based to the greatest possible degree on information obtained by direct observation of the child or direct interview of the child in the home setting.

(d) For a child between the ages of twelve and twenty-two years, a thorough diagnostic assessment of the ability of the child to benefit from regular or specially designed vocational education programs including, as appropriate, an appraisal of the child's pattern of work behavior, ability to acquire occupational skill and capacity for successful job performance in conformance with the vocational education requirements to be specified in the rules and regulations of the Indian School Equalization Program.

§ 31k.24 Test administration.

Agencies shall insure, at a minimum, that:

(a) Tests and other evaluation materials:

(1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

(2) Have been validated for the specific purpose for which they are used; and

(3) Are administered by trained personnel in conformance with the instructions provided by their producer;

(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;

(c) Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors which the test purports to measure);

(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child;

(e) The child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities;

(f) Tests, to the greatest extent possible, are free from racial, cultural and sex bias; and

(g) Determinations of mental retardation are based on an assessment of a variety of factors including adaptive behavior and past and current development activities (e.g., indices or manifestations of social, intellectual, adaptive, verbal, motor, language, emotional and self-care development for age).

§ 31k.25 Location of evaluation.

(a) The evaluation shall take place in geographical proximity to the school unless moving the child to such a location would seriously endanger the health or safety of the child or of others. Such determination shall be made jointly by the child's parents and the school.

(b) When a child has been referred for an evaluation and, at the time of such referral, such child is in a hospital or is otherwise living away from home, the Agency shall make appropriate arrangements for the provision of the evaluation.

§ 31k.26 Multi-disciplinary evaluation team procedures.

(a) Each individual evaluation must be completed, with full attention to its comprehensiveness and thoroughness, within thirty days from the date of

written parental consent. An extension of time of thirty additional days may be approved in writing by the Agency Superintendent for Education after written documentation by the school that unusual circumstances exist preventing completion of the individual evaluation in the specified time. No more than one extension may be approved in connection with a single individual evaluation unless approved in writing by the Director.

(b) The comprehensive assessment must reflect a compilation of information drawn from different assessment sources. The depth of the assessment in each area will vary based on the initial review of screening information conducted by the Special Education Coordinator. The weight given to each source area must be made of any discrepancies between formal test results and the child's customary behavior and daily activities, and of any discrepancies among test results.

(c) The Special Education coordinator is responsible for ensuring that full and complete records of information collected or generated in connection with an individual evaluation are maintained. A report setting forth a full written explanation of the findings and the recommendations made by the multi-disciplinary evaluation team must be prepared. The report must include:

(1) A description of the child's present level of functioning;

(2) A description of the needs of the child in rank order of importance;

(3) A recommendation of the types of services which should be provided for each listed need;

(4) A written summary of the procedures employed, the results, and the diagnostic impression;

(5) A proposed date for the review of the child's progress prior to the annual review, if such assessment so indicates;

(6) Criteria by which at that time, the effectiveness of the child's program may be determined; and

(7) Information sufficient to permit a determination of the cultural compatibility between the child and the test administrator and the testing (or other evaluative) environment.

(d) Each member of the multi-disciplinary evaluation team shall certify in writing whether the report prepared by the team reflects his or her conclusions, and if not, shall submit a separate statement presenting his or her conclusions. The report must be prepared no later than ten days after completion of the evaluation.

(e) Members of the multi-disciplinary evaluation teams must be responsible for all aspects of the individual evaluation including the selection,

administration and interpretation of evaluation materials; the collection of all appropriate social and cultural background and adaptive behavior information related to each evaluation; and the confidentiality of information collected during the individual evaluation.

(f) The multi-disciplinary evaluation team may use and decide to rely in whole or in part on information collected in another school attended by the child during the twelve months which preceded the initiation of the individual evaluation.

§ 31k.27 Emergency evaluation and placement.

(a) Where a child demonstrates documented instances of dangerously assaultive or self-abusive behavior, the child shall be referred immediately by the School Supervisor to the Special Education Coordinator for an emergency evaluation which shall be convened by the Agency the same day. The Agency shall, no later than the following day, determine that an emergency placement of the child on a temporary basis is unwarranted or shall recommend a temporary placement for the child for a period not to exceed ten days.

(b) The parent shall be informed immediately of the child's behavior and shall participate (if possible within the constraints of time) in the emergency evaluation and related placement decision and no special placement shall be made without the prior notification of the child's parent.

(c) Within ten days after the completion of the emergency evaluation, a comprehensive individual evaluation, with written parental consent, shall be completed consistent with the provisions of this part.

§ 31k.28 Independent educational evaluation.

(a) The parents of a handicapped child have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (f) of this section. Each School/Agency shall provide to parents, on request, information about where an independent educational evaluation may be obtained.

(b) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the school or agency. However, the school or agency may initiate a hearing to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at school expense.

§ 31k.29 Additional procedures for evaluating specific learning disabilities.

(c) If the parent obtains an independent educational evaluation at private expense, the results of the evaluation:

(1) Must be considered by the school in any decision made with respect to the provision of a free appropriate public education to the child; and

(2) May be presented as evidence at a hearing regarding that child.

(d) If a hearing officer requests an independent educational evaluation as part of a hearing the cost of the evaluation must be at school or Agency expense.

(e) Whenever an independent evaluation is at school or Agency expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the school or Agency uses when it initiates an evaluation.

(a) In evaluating a child suspected of having a specific learning disability, in addition to the requirements of § 31k.22, each Agency shall include on the multi-disciplinary evaluation team:

(1) The child's regular teacher; or

(2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or

(3) For a child of less than school age, an individual qualified to teach a child of his or her age; and

(4) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.

(b) At least one team member other than the child's regular teacher shall observe the child's academic performance in the regular classroom setting. (In the case of a child of less than school age or out of school, a team member shall observe the child in an environment appropriate for a child of that age.)

(c) The team may determine that a child has a specific learning disability if:

(1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraphs (c)(2) of this section, when provided with learning experiences appropriate for the child's age and ability levels; and

(2) The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas:

(i) Oral expression;

(ii) Listening comprehension;

(iii) Written expression;

(iv) Basic reading skill;

(v) Reading comprehension;

(vi) Mathematics calculation; or

(vii) Mathematics reasoning.

(d) The multi-disciplinary team may not identify a child as having a specific learning disability if the severe discrepancy between ability and achievement is primarily the result of:

(1) A visual, hearing, or motor handicap;

(2) Mental retardation;

(3) Emotional disturbance; or

(4) Environmental, cultural or economic disadvantage.

(e) The multi-disciplinary team shall prepare a written report of the results of the evaluation. The report must include a statement of:

(1) Whether the child has a specific learning disability;

(2) The basis for making the determination;

(3) The relevant behavior noted during the observation of the child;

(4) The relationship of that behavior to the child's academic functioning;

(5) The educationally relevant medical findings, if any;

(6) Whether there is a severe discrepancy between achievement and ability which is not correctable without special education and related services; and

(7) The determination of the team concerning the effects of environmental, cultural, or economic disadvantage.

(f) Each team member shall certify in writing whether the report reflects his or her conclusion. If it does not reflect his or her conclusion, the team member must submit a separate statement presenting his or her conclusions. The report must be prepared no later than 10 days after completion of the evaluation.

Subpart C—Provision of Special Education and Related Services

§ 31k.30 Free, appropriate public education.

(a) Each school must ensure that a free, appropriate public education is provided to every handicapped child enrolled in the school between the ages of three and twenty-one years.

(b) An appropriate education is one which meets the individual educational needs of a handicapped child as adequately as the needs of other children are met in the least restrictive educational setting. An appropriate education necessarily involves the provision of regular education, special education and necessary related aids or services and includes pre-school, elementary school, or secondary school education.

(c) The provision of a free education is the provision of educational and related services without cost to the child (or parents), except for those fees that are imposed on a non-handicapped child, and may consist of the provision of free services or the payment of the costs of the program. Transportation must be provided in order to assure access of persons to services.

§ 31k.31 Individualized Education Program (IEP).

(a) If, as a result of an individual evaluation, a child is determined to be a handicapped child and in need of special education and related services, schools are required to develop an IEP within thirty days from the date of receipt of the written individual evaluation report. The IEP shall set forth the approach which will be taken to ensure that the child will be provided a free, appropriate public education.

(b) An IEP must:

(1) be in effect at the beginning of each school year for every handicapped child who has been properly evaluated and who is receiving special education and related services from that school;

(2) be in effect before special education or related services are provided to a child; and

(3) be implemented as soon as possible following the meeting described in § 31k.34.

§ 31k.32 Content of Individualized Education Program (IEP).

At a minimum, the IEP must contain:

(a) A statement of the child's present levels of educational performance;

(b) A statement of annual goals, including short term instructional objectives;

(c) A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;

(d) The projected dates for initiation of services and the anticipated duration of the services;

(e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved; and

(f) A description of the nature and duration of physical education services to be provided to the child.

§ 31k.33 IEP development.

(a) Overall responsibility for the development of each IEP rests with the School Supervisor.

(b) The IEP shall be developed by a committee which shall hold at least one

meeting and includes among its members the following:

(1) The School Supervisor, or designee (who shall chair the committee) other than the child's teacher, who is qualified to provide, or supervise the provision of, special education;

(2) The child's teacher and/or other relevant instructional staff;

(3) One or both of the child's parents;

(4) The child, where appropriate; and

(5) Other individuals at the discretion of the parent, agency, or school.

(c) For a handicapped child who has been evaluated for the first time, the Agency shall insure:

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the school, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

(d) Upon receiving written application from the school, the Director may allow the school to postpone the development of an initial IEP to the beginning of a new school year, if the written evaluation report is completed within fifteen days of the end of the current school year and, if the Director determines that a required member of the IEP committee will be unavailable during the summer recess.

(e) Schools must prepare a progress report related to the instructional objectives specified in the IEP for each handicapped child and must include it with, in, or in lieu of the grading report prepared by the school for all elementary and secondary students.

§ 31k.34 Placement recommendation in the IEP.

(a) Placement recommendations shall be made by the School Supervisor in concert with the IEP committee and shall be incorporated in the IEP.

(b) A proposed placement must be selected from the continuum of alternative placements available to the school. Schools may not decline to propose placement for a child or recommend to parents that a child be enrolled "voluntarily" in non-public school programs. In selecting from the continuum of alternative settings, no handicapped child may be proposed for placement in any of the settings listed below outside of the regular classroom unless it can be demonstrated that the nature of severity of the child's disability is such that education in regular classes (in the school the child would attend if not handicapped) with the use of supplementary aids and services cannot be achieved

satisfactorily. Each school must ensure that a continuum of alternative placements which meets the particular needs of each enrolled handicapped child is available. Such alternatives should include:

(1) The regular classroom;

(2) The regular classroom with consultation;

(3) The regular classroom with resource teacher;

(4) The regular classroom with itinerant resource teacher;

(5) The regular classroom in conjunction with a resource room;

(6) A self-contained special classroom with part-time instruction in regular class;

(7) A self-contained special class (regular campus);

(8) A self-contained special class in a special day facility;

(9) Homebound instruction; and

(10) Instruction in hospitals and residential facilities.

(c) Placement of a handicapped child in a boarding school operated by the Bureau which concurrently enrolls non-handicapped children of the same age and grade shall be considered placement in a regular school campus.

(d) Alternative placements may be provided directly by the school, provided through cooperative arrangements with local and state education agencies or, except as provided in (g) of this section, provided through contractual arrangements with approved non-public schools, agencies or institutions.

(e) Alternative (9), homebound instruction may not be selected unless the handicapped child:

(1) Currently possesses a physical impairment or illness which directly (or because of treatment required) precludes the movement of the child from a hospital or home environment to the general education environment; or

(2) Has been determined (after an individual evaluation) to require a program of continuous mental health care and treatment which would be seriously disrupted by movement to the general educational environment. The proposed homebound instruction should permit the return of the child to the general education environment at a specified date. The Director must be immediately notified in writing of each homebound placement made by the school.

(f) Alternative placement (10) may not be selected unless the health or safety of the child precludes the child's attendance at a nearby school for special education services.

(g) Alternative placements (1)-(8) may not be provided through contractual

arrangements with approved non-public schools, agencies or institutions if there are a sufficient number of handicapped children with similar educational needs who live within the attendance area served by the school to justify the allocation of one teacher pursuant to pupil/teacher ratios to be established by the Director and published in a BIA procedures manual.

(h) Children both above and below the age at which public education is mandatory for children who are not handicapped may be provided services by a school directly or through a general contractual arrangement between the school and the Agency serving the school so long as:

(1) The children of the given age receiving services are handicapped children;

(2) The organization providing the services complies with the least restrictive environment requirements of this part; and

(3) The school, Agency and subcontractor comply fully with all applicable state and Federal laws and regulations governing the provision of services to children; the facility in which services are provided; and the qualifications of the staff providing services.

(i) If the parents and the School supervisor believe that a residential placement for a child is appropriate they should notify the Special Education coordinator in writing. Upon receipt of such notice, the Special Education Coordinator, with the approval of the Agency Superintendent for Education, expressly approves the education component of the proposed placement as providing a free, appropriate public education to the child in the least restrictive environment while residing in the facility. The Director shall not approve the education component of a proposed placement unless a full individual evaluation as described in § 31k.19-27 has been conducted.

(j) The temporary admission of a child to a program of respite care or on an emergency basis shall not constitute a significant change in placement if it is made with parental approval and is limited to:

(i) No more than thirty days in the case of respite care, and

(ii) No more than the number of days allowed for emergency commitment (i.e., before court review is required) under the laws of the state in which the school is located.

§ 31k.35 Approval of IEP and placement recommendation.

(a) The school must attempt to schedule a meeting which includes the

School Supervisor, the child's parent(s), and the receiving teacher and others as identified in § 31k.33. The meeting should be scheduled at a mutually agreeable time and place. The parents should be notified of the meeting early enough to insure that they will have an opportunity to attend.

(b) The parent(s) of the child must be provided full and effective written notice of the meeting and all reasonable efforts must be made by the School supervisor to ensure parental participation. The written notice to parents shall also contain the following information:

(1) A statement that the evaluation has been completed and that the parents have the right to meet with the School supervisor, the Evaluation Coordinator or any member of the IEP committee to discuss and plan the IEP.

(2) A statement that all papers relevant to the evaluation, including the actual written assessments, are available for inspection by the parents or a designated representative of the parents;

(3) A statement that the parent has a right to an independent evaluation as provided in § 31k.28 of this part;

(4) A statement of the parent's options under subsection (c) of this section and a form for indicating the option selected by the parent; and

(5) A statement explaining the consequences of the parent's rejection of the proposed IEP under the due process procedures established by section 31k.57 of this part.

(c) the parent of a child, upon receipt of full and effective notice, may exercise any of the following options (by giving written notice to the school):

(1) To accept or reject a written evaluation finding that the child does, not need special education;

(2) To accept or reject the IEP. A parent may accept an IEP in whole or in part and the school shall immediately implement the mutually accepted elements of the IEP;

(3) To accept a modified IEP that has been mutually agreed upon with the School Supervisor Coordinator following the meeting described in subsection (a) of this section; or

(4) To postpone a decision on the IEP until the completion of an independent evaluation; and

(5) To obtain an independent evaluation of their child.

(d) this meeting may be the first and only full meeting of the IEP committee. The meeting must include a thorough discussion of the results of the child's individual evaluation, the child's proposed IEP and the child's proposed educational placement. The school

supervisor should take whatever action is necessary to insure that the parents understand the proposed IEP and the proposed educational placement before requesting consent for placement. At the close of the meeting, each member of the committee shall sign the completed IEP to signify their participation and agreement with the educational plan.

§ 31k.36 Parent participation.

(a) Each school shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:

(1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting, and who will be in attendance.

(c) If neither parent can attend, the school shall use other methods to insure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the school is unable to convince the parents that they should attend. In this case the school must have a record of its attempts to arrange a mutually agreed on time and place such as:

(1) Detailed records of telephone calls made or attempted and the results of those calls;

(2) Copies of correspondence sent to the parents and any responses received; and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The school shall take whatever action is necessary to insure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(f) The school shall give the parent a copy of the individualized education program.

§ 31k.37 IEP Implementation and placement.

(a) For newly identified children, the IEP must be implemented and educational placement must be made:

(1) Within thirty days after the written parental approval of the placement has been received; or

(2) If the due process hearing procedure has been activated, within thirty days after a final written decision has been issued by a hearing officer, the

Director or a court of competent jurisdiction.

(b) If the school cannot, within thirty days, provide any or all of the services called for in the IEP the School Supervisor must consult the Agency Superintendent of Education on alternate means of providing the services to fully implement the IEP. The Agency Superintendent of Education must make provision for the service within fourteen days of the consultation.

(c) For children currently receiving services under an IEP consistent with the requirements of this part, the IEP must be reviewed and revised as appropriate so as to be in effect prior to the first day of school of the next full term.

§ 31k.38 IEP revision, review of placement.

(a) Consistent with the requirements of § 31k.37, the IEP must be reviewed and updated annually. The review and revision of the IEP must be completed no later than the first day of school of the next full term, and reevaluation must be scheduled accordingly. Whenever possible, the review shall be scheduled near the time that there may be a change in the personnel providing the major services to the child under the IEP, as when the child is to move from one grade or school to another. The review shall be conducted as follows:

(1) The School Supervisor, the parents, and the person(s) providing the major services to the child under the IEP shall meet and make a careful review of the child's progress based upon the progress reports submitted by the school during the grading period, and the observations of those working with the child.

(2) The School Supervisor shall invite (in writing) the child's parents and, where appropriate, the child, to attend and participate in the review meeting. The School Supervisor or the parents may, at their discretion, invite other person(s) who have worked with, are working with, or will be working with the child to attend the review meeting.

(3) The participants in the review meeting shall determine:

(i) Whether the child has achieved the goals set forth in the IEP;

(ii) Whether the child has met the criteria which indicate readiness to enter a less restrictive program;

(iii) Whether the program the child is in should be specifically modified to make it more suitable to the child's needs; and

(iv) Whether it is desirable to refer the child for an individual re-evaluation

(4) The participants in the review meeting shall review the current IEP and revise it as appropriate in accordance

with § 31k.34 of this part. If a re-evaluation of the child is scheduled in accordance with § 31k.39 of this part, the revision of the new IEP shall be deferred until completion of the re-evaluation. If the parent is unable to attend the review meeting, the school shall provide the parent with copies of all relevant documents within five days after the review meeting has been completed.

(5) During the annual review, the description of current educational performance in the IEP must be updated and the overall educational needs, long-term educational goals and related services modifications made. Schools are required to rewrite sections of the IEP only to the extent necessary to update or modify the plan.

§ 31k.39 Re-evaluation.

The Agency shall provide a full individual re-evaluation of a child when such re-evaluation is recommended by a parent, teacher or by the Special Education Coordinator. Parental approval is not required for the conduct of a re-evaluation if the child has been initially placed and his/her individualized education program has been reviewed following the requirements of this part. Notice of the conduct of the re-evaluation must be provided to the parent prior to the re-evaluation. A written summary of the re-evaluation must be provided to the parents within five days of the scheduled review meeting, if re-evaluation and annual review of the IEP coincide.

§ 31k.40 Extended school year services.

(a) The individualized education program may provide for continuous instruction (uninterrupted by the regular summer recess) whenever:

(1) Continuous instruction is likely to be necessary in order to sustain with only minor regression current important educational skills and information retention;

(2) The child lives in a residential facility or institution.

(b) The extension of an IEP for a ten to twelve month instructional program shall not result in a more restrictive change in placement on the continuum of alternative placements nor shall it constitute a basis for any deviation from any other educational placement requirement of § 31k.35 of this part. However, the increased isolation of handicapped children which could result from the operation of an instructional program for handicapped children during a period of time when non-handicapped children are not attending

school would not violate any requirements of this part.

§ 31k.41 Outcome goals.

IEP's for children over the age of twelve years shall contain, as appropriate, either a description of regular and/or special education instructional services leading to the attainment of a regular high school diploma before the age of twenty-two or a program of regular or special vocational education leading to participation in a work-experience (or sheltered employment) program and the attainment of an appropriate level of vocational proficiency to permit, wherever possible, the child's entry into competitive employment upon or before reaching the age of twenty-two.

§ 31k.42 Related services.

The school must provide each handicapped child whatever developmental, corrective and other supportive services are required to assist the child to benefit from special education.

§ 31k.43 Non-academic and extracurricular services.

(a) Non-academic and extracurricular services and activities must be offered in a way which allows equal opportunity for handicapped children to participate in services and activities.

(b) Non-Academic and extracurricular services, meals and recess periods must be provided in the most integrated setting appropriate to the needs of the child.

§ 31k.44 Physical education and athletics.

(a) Handicapped children must be provided an equal opportunity for participation in physical education courses and inter-scholastic, club or intramural athletics sponsored by the school.

(b) Physical education services must be provided to handicapped children in the regular physical education program and may not be different from those provided other children, unless:

(1) The child is enrolled full time in a separate facility or needs specially designed physical education; and,

(2) A separate physical education setting is the least restrictive environment.

§ 31k.45 Discipline.

A handicapped child may not be expelled or suspended from school or otherwise subjected to disciplinary treatment if the behavior for which action is being taken is related to the child's disability. Where a handicapped child is so disruptive in the regular classroom or other alternative setting

that the education of other children is impaired, the needs of the child cannot be met in that environment. Accordingly, continued placement would not be the least restrictive environment appropriate to the needs of the child and a review of the child's IEP and placement described in § 31k.38 of this part must be undertaken.

§ 31k.46 Geographic accessibility.

Consistent with the requirements of the IEP, the educational placement of a child must be as close to the child's home as possible. The placement of a handicapped child in an off-reservation boarding school operated by the Bureau shall not be regarded as inconsistent with this requirement to the extent that similarly situated non-handicapped students are also placed.

§ 31k.47 Architectural barriers and program accessibility.

(a) Facilities used by schools, directly, or through contractual arrangement, must be accessible to and usable by handicapped children. The accessibility standards of the American National Standards Institute (ANSI A117.1-1961 (R 1971)) shall be adhered to wherever possible. Small schools located in isolated locations may make application to the Director for a waiver of any standard based on a showing of administrative impossibility. In no event may architectural barriers prevent a handicapped child from being educated in the least restrictive educational environment as defined in § 31k.34 of this part.

(b) Program accessibility (i.e., where each program or activity, when viewed in its entirety, is readily accessible to handicapped children) must be ensured in all existing facilities.

(c) Program accessibility may be accomplished through the following methods:

- (1) Redesign of equipment;
- (2) Reassignment of classes or other services to accessible building;
- (3) Assignment of aides to children;
- (4) Home visits;
- (5) Alteration of existing facilities; or
- (6) Other methods.

(d) The method for accomplishing program accessibility which offers programs and activities to children in the most integrated setting appropriate must be selected.

§ 31k.48 Handicapped children in private schools placed or referred by agencies.

Requirements of this part apply to handicapped children who are or have been placed in or referred to a private school or facility by an Agency as a means of providing special education and related services.

(a) Each Agency shall insure that a handicapped child who is placed in or referred to a private school or facility:

(1) Is provided special education and related services in conformance with an individualized education program which meets the requirements under § 31k.30-§ 31k.38 of Subpart C at no cost to the parents; and

(2) At a school or facility which meets the standards that apply to Agencies (including the requirements in this part).

(b) In implementing the requirements of this part the Agency shall:

(1) Monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires;

(2) Disseminate copies of applicable standards to each private school and facility to which an Agency has referred or placed a handicapped child;

(3) Provide an opportunity for those private schools and facilities to participate in the development and revision of BIA standards which apply to them; and

(c) Assure that handicapped children have all of the rights of a non-handicapped child.

§ 31k.40 Handicapped children in private schools placed by parents.

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the Agency is not required by this part to pay for the child's education at the private school or facility.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under § 31k.57-§ 31k.83 of Subpart D.

Subpart D—Procedural Safeguards

§ 31k.51 Full and effective notice.

(a) Full and effective notice is written notice which:

(1) Contains a full explanation of all the procedural safeguards available to the parents including confidentiality requirements;

(2) Describes the proposed (or refused) action, explains the reasons for such action and describes any options which were considered and rejected;

(3) Describes each evaluation procedure, test, record or report used as a basis for the action and any other relevant factors;

(4) Identifies the employee or employees of the school who may be contacted;

(5) Is written in language understandable to the general public

and provided in the native language of the parent (oral and/or written) or other mode of communication used by the parent(s) unless clearly not feasible; and

(6) Is also communicated orally (where necessary) in the primary language or other mode of communication so that the parent understands the content of the notice.

(b) If an interpreter is used as part of the procedure for providing full and effective notice, the school must maintain a written record to the effect that the parent understood the matters presented, signed by the interpreter.

§ 31k.52 Parental consent.

(a) Parental consent must be obtained before personally identifiable information is:

(1) Disclosed to anyone other than officials of participating agencies collecting or using the information under this part;

(2) Used for any purpose other than meeting a requirement under this part; or

(3) Used for purposes other than those previously specified to the parent (in the native language if necessary).

§ 31k.53 Rights of handicapped children.

Handicapped children shall have the right to:

(a) Non-Discrimination on the basis of handicap;

(b) A free appropriate public education;

(c) An independent educational evaluation as provided in this part, and careful consideration of the results of an independent evaluation with respect to the provision of a free appropriate education;

(d) Be accompanied and represented by persons of his/her choice at any meeting or conference required or permitted by this part;

(e) Inspection and review of all relevant records with respect to the identification, evaluation and placement of the child and the provisions of a free appropriate education;

(f) A hearing on any action for which notice is required with opportunity for direct participation, representation by counsel, and other procedural rights;

(g) Complain to the Agency Superintendent for Education, or the Area Education Program Administrator as appropriate, and to the Director relating to identification, evaluation or placement or to the provision of a free, appropriate education;

(h) A surrogate parent assigned by the school where appropriate;

(i) A copy of the full written explanation and findings of the individual evaluation as soon as it is

completed together with a full oral explanation (effectively communicated) of both the findings and the recommendations;

(j) A personal consultation with a member of the multi-disciplinary team;

(k) Full and effective notice of proposed actions as provided in this part;

(l) Parental approval or disapproval as provided in this part; and

(m) Information concerning any free or low-cost legal and other relevant services available if a hearing is initiated or upon request.

§ 31k.54 Access rights.

(a) Each school and Agency must permit parents to inspect and review any records directly relating to their children which are collected and maintained by them or by a party acting for the school.

(b) A parental request to inspect and review records must be complied with without unnecessary delay and before any meeting regarding an individualized education program or hearing relating to the identification, evaluation, or placement of the child, and in no case more than fourteen days after the request has been made. The right to inspect and review educational records under this section includes:

(1) The right to a response to reasonable requests for explanations and interpretations of the records;

(2) The right to request that copies of the records containing the information be provided at no cost to the parents;

(3) The right to have a representative of the parent (authorized in writing) inspect and review the records.

(c) The parent shall be presumed to have authority to inspect and review records relating to his or her child unless the school has been advised that the parent does not have to authority under applicable tribal or state law governing such matters as guardianship, separation, and divorce.

(d) A record of parties obtaining access to education records (except access by parents and authorized employees of the school) must be kept and must include the name of the party, the date access took place, and the purpose of the authorized use.

(e) If any education record includes information on more than one child, the parents of those children shall have the right to inspect and review only the information relating to their child or to be informed of that specific information.

(f) Parents, upon request, shall be provided a list of the types and locations of education records collected, maintained or used by the school or Agency.

(g) A parent who believes that information in the education records is inaccurate or misleading or violates the privacy or other rights of the child, may request that the information be amended. The school or Agency must decide whether to amend the information as requested within fourteen days of receipt of request. If the school or Agency decides to refuse to amend the information, it must inform the parent of the refusal and advise the parent of the right to a hearing under 45 CFR 99.22.

§ 31k.55 Confidentiality of information.

(a) The confidentiality of personally identifiable information must be protected at collection, storage, disclosure, and destruction stages.

(b) One person designated by the school must assume responsibility for insuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the policies and procedures set forth in this subpart.

(d) Schools must maintain, for public inspection, a current listing of the names and positions of the employees who may have access to personally identifiable information.

(e) Schools must inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child. The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, phone number, grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

§ 31k.56 Surrogate parents.

(a) Whenever a school after documented, repeated and reasonable efforts is unable to identify and locate a parent of a handicapped child, or of a child suspected of being a handicapped child, or whenever a child is a ward of a court, the School Supervisor must appoint an individual to act as a surrogate parent after consultation with tribal representatives.

(b) The surrogate parent shall represent the child in all matters relating to the identification, individual evaluation and educational placement of the child and the provision of a free appropriate public education.

(c) The person appointed as a surrogate parent shall:

(1) Have no interest that conflicts with the interests of the child and shall not be

a present or past employee of the school involved in the education or care of the child or a present employee of the Bureau of Indian Affairs;

(2) Have knowledge and skills that insure adequate representation of the child; and

(3) Wherever possible, be a member of the child's extended family, or if that is not possible, a member of the same tribe as the child.

(d) Surrogate parents may not be appointed for the sole purpose of representing parents at the IEP conference.

(e) Payment of fees for service as a surrogate parent does not, in and of itself, render a person an employee.

§ 31k.57 Conciliation.

The school must make all reasonable efforts consistent with its obligations under this part to resolve informally any ongoing disputes between the parent and the school.

§ 31k.58 Initiation of hearings.

(a) If the parent disagrees with any action taken by a school for which full and effective notice to parents is required by this part, a hearing may be initiated by the parent of a handicapped child or a child suspected of being a handicapped child, by sending a written request for hearing to the Agency School Superintendent. The Agency School Superintendent must acknowledge receipt of the written request within three days of actual receipt.

(b) Hearings may be initiated by a school by providing full and effective notice to parents in any instance where, after reasonable efforts at conciliation, a parent either fails to provide written approval of a proposed action, or provides a formal disapproval.

(c) Whenever a hearing is initiated, full and effective notice of the initiation of the hearing must be provided by the hearing officer to all persons concerned.

(d) The written notice of hearing shall include:

(1) A statement of the date, time, place and nature of the hearing;

(2) A statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) A reference to the particular sections of the statutes or regulations involved; and

(4) A short and plain statement of matters asserted.

§ 31k.59 Hearing officers.

(a) A proposed hearing officer must be selected by the Agency Superintendent for Education within one day of receipt of a request for a hearing, from a list

established and maintained by the Agency.

(b) After selecting a proposed hearing officer, the Agency Superintendent for Education must, within three days, give the parent(s) and the school full and effective notice of the name of the proposed hearing officer.

(c) The parent and school, each upon notice of the proposed hearing officer, may request that the Agency/Area determine that the person so proposed is not impartial and may exercise one automatic disqualification during the appointment process. The Director shall resolve all challenges for cause (i.e., partiality).

(d) If the proposed hearing officer is automatically disqualified or found to be not impartial by the Director, the Agency Superintendent for Education must within three days designate another person from the relevant lists.

(e) Final appointment of a hearing officer occurs whenever a proposed hearing officer is selected by the Agency Superintendent for Education and the parent or the School fails to notify the Agency Superintendent for Education of a decision to challenge the impartiality of the proposed hearing officer or of a decision to automatically disqualify the proposed hearing officer (available only once for each party), or when the Director determines that no doubt exists as to the impartiality of a proposed hearing officer.

§ 31k.60 Impartial hearing officer.

(a) A hearing may not be conducted:

(1) By a person who is an employee of a school, or of the BIA, who is involved in the education or care of the child, or

(2) By any person having a personal or professional interest which would conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the Agency solely because he or she is paid by the Agency to serve as a hearing officer.

§ 31k.61 Hearing rights.

(a) Any party to a hearing has the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing;

(4) Obtain a written or electronic verbatim record of the hearing;

(5) Obtain written findings of fact and decisions.

(b) Parents involved in hearings must be given the right to:

- (1) Have the child who is the subject of the hearing present; and
- (2) Open the hearing to the public.

§ 31k.62 Hearing decision: Appeal.

A decision made in a hearing conducted under this subpart is final, unless a party to the hearing appeals the decision under § 31k.64.

§ 31k.63 Administrative appeal; impartial review.

(a) If the hearing is conducted by an Agency, any party aggrieved by the findings and decision in the hearing may appeal to the Director.

(b) If there is an appeal, the Director shall conduct an impartial review of the hearing. The Director or his designee conducting the review shall:

- (1) Examine the entire hearing record;
- (2) Insure that the procedures at the hearing were consistent with the requirements of due process;
- (3) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in § 31k.62 apply;
- (4) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;
- (5) Make an independent decision on completion of the review; and
- (6) Give a copy of written findings and the decision to the parties.

(c) The decision made by the reviewing official is final, unless a party brings a civil action.

Subpart E—Personnel

§ 31k.64 Appointment of Special Education Coordinator.

Each Agency shall, if the size of the school and the percentage of handicapped students justify such a person, employ a qualified Special Education Coordinator on a full-time basis no later than the effective date of this part unless the Director approves a written justification for a part-time position. If there are no schools in an Agency, this requirement does not apply.

§ 31k.65 In-service training.

(a) Each LEA application must provide assurance that ongoing inservice training programs are available to all personnel who are engaged in the education of handicapped children.

(b) Each plan must:

(1) Describe the process used in determining the in-service training needs of personnel engaged in the education of handicapped children;

(2) Identify the areas in which training is needed (such as, but not limited to, individualized education programs, non-discriminatory testing, least restrictive environment, procedural safeguards, and surrogate parents);

(3) Specify the groups requiring training (such as, but not limited to, special teachers, regular teachers, administrators, psychologists, speech-language pathologists, audiologists, physical education teachers, therapeutic recreation specialists, physical therapists, occupational therapists, medical personnel, parents, volunteers, hearing officers, and surrogate parents);

(4) Describe the content and nature of training for each area under paragraph (b)(2) of this section;

(5) Describe how the training will be provided in terms of:

- (i) geographical scope; and
- (ii) staff training source (such as college and university staff, state and local educational Agency personnel, and non-Agency personnel);

(6) Specify:

- (i) The funding sources to be used;
- (ii) The time frame for providing it; and

(7) Specify procedures for effective evaluation of the extent to which program objectives are met.

§ 31k.66 Qualifications of staff.

Job qualifications requirements shall be in conformance with § 31g.4 of the BIA Education Personnel Regulations.

Subpart F—School Administration

§ 31k.70 Assurance of compliance.

In connection with each annual application for assistance under the part, each school must sign a written assurance that the pre-school, elementary and secondary program operated by the school is currently in compliance and will, in the future, be operated in compliance with this part and any other applicable Federal law.

§ 31k.71 Self-evaluation.

Each Agency must complete a comprehensive self-evaluation on or before the first anniversary of the effective date of this part. In order to carry out such a comprehensive self-evaluation, each Agency must with the direct involvement of interested persons and organizations, including handicapped persons or organizations representing handicapped persons:

(a) Evaluate the current policies and practices and the effects thereof on

handicapped persons of the Agency and the schools located thereunder;

(b) Modify any policies and practices that are unlawful under this part or under other applicable Federal regulations;

(c) Take appropriate remedial steps to eliminate the effects of any discrimination that resulted from past adherence to these policies and practices; and

(d) Maintain on file for three years following the completion of the self-evaluation, available for public inspection: a list of interested persons consulted, a description of areas examined and any problems identified, and a description of any modifications made and any remedial steps taken.

§ 31k.72 Comparability of facilities.

Facilities which are identifiable as being for handicapped children and the services and activities provided therein, must meet the same standards and level of quality as do facilities, services and activities provided to non-handicapped children.

§ 31k.73 Non-discrimination in administration of schools.

(a) No Bureau of Indian Affairs operated and/or funded school shall deny admission to any qualified handicapped child on the basis of handicap.

(b) Each school must provide to each handicapped child enrolled therein whatever educational support services (including tutoring, access to instructional equipment, auxiliary aids) are necessary to permit the child to fully benefit from the program of special education and related services.

Subpart G—Responsibilities of the Division

§ 31k.74 The Division.

The Division of Exceptional Education shall provide staff assistance to the Director of the Office of Indian Education Programs to insure that schools, Agencies, and Areas conform with the requirements of this part. The Division shall prepare and submit the annual program plan required by the Education of the Handicapped Act. The Division shall be under the supervision of a Division Chief who reports to the Director. The Director is responsible for educational programs for handicapped children and has the overall responsibility for insuring that every handicapped Indian child to whom this part applies is provided a free, appropriate public education and, that all requirements of this part are fully complied with by schools, Agencies, and Areas.

§ 31k.76 Monitoring.

(a) The Division of Exceptional Education shall regularly monitor and evaluate the compliance of schools, Agencies, Areas and other affected public and non-public agencies with the requirements of this part consistent with written procedures for conducting this monitoring (including specific timelines) which include:

- (1) Collecting data and reports;
- (2) Conducting on-site visits;
- (3) Reviewing Federal fund utilization;
- (4) Comparing (by sampling) IEP programs; and
- (5) Case-by-case review of the continued need for residential placement.

(b) Schools, Agencies, Areas, non-public school programs and other affected Agencies shall keep such records and submit to the responsible Division official (or designee) timely, complete and accurate compliance reports at such times, and in such form and containing such information as is determined to be necessary to enable the Division to ascertain compliance with the requirements of this part, with due consideration given to the difficulties of collecting information from individual files and records and the need for advance notice.

(c) Schools, Agencies, Areas, non-public school programs and other affected agencies must permit access by the staff of the Division of Exceptional Education to its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance.

(d) The Division of Exceptional Education may conduct inquiries and hearings on behalf of an individual child or group of children, regarding failure to comply with any provisions of this part.

(e) The Division of Exceptional Education shall closely monitor the implementation of the procedural safeguard requirements of Subpart D of this part.

§ 31k.76 Complaint procedures.

(a) The Director shall receive, review, and resolve complaints and act on any allegations of substance on actions taken by a school or Agency that are contrary to the requirements of this part.

(b) In carrying out the requirements of paragraph (a) of this section the Division (on the behalf of the Director) will assist Agencies to achieve compliance through:

- (1) Technical Assistance;
 - (2) Negotiation; and/or
 - (3) Third Party mediation.
- (c) Failure to comply with the requirements of this part (after appropriate action as described in

paragraph (b) of this section) shall result in sanctions under existing BIA procedures including the withholding of Part B funds until the Agency achieves compliance with the requirement of this part.

§ 31k.77 Use of available funds.

The Director shall insure, as a condition for receipt of any Education for the Handicapped Act funds, that schools, Agencies, Areas, and the Division fully utilize all funds specifically appropriated for the special education program of the Bureau and all funds to which schools become entitled pursuant to 25 CFR 31k.12-13 because of the enrollment of handicapped children exclusively for the identification and evaluation, of, and the provision of a free, appropriate public education to handicapped Indian children.

§ 31k.78 Children for whom the division of Social Services has accepted financial responsibility.

(a) After the effective date of this part, the Director is vested with full responsibility for the provision of a free, appropriate public education to all handicapped Indian children in the care of the Division of Social Services who reside in any public or private facility.

(b) After the effective date of this part, no handicapped Indian child in the care of the Division of Social Services may be placed in or referred to any public or private residential facility; the education component of which has not been approved by the Division of Exceptional Education.

(c) The Director shall insure that no later than one year from the effective date of this part, every handicapped child currently the responsibility of the Division of Social Services in a public or private residential facility has been evaluated and provided an IEP in full conformance with the requirements of this part. The need of the children for continued residentially-based education services will be carefully assessed during this process.

(d) Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped child.

§ 31k.79 Cooperative agreements.

(a) The Director, or designee, is authorized to enter into cooperative agreements with state and local education agencies for the provision of special education and related services to handicapped children enrolled in schools, operated and/or funded by the Bureau.

(b) The Director may not enter into any cooperative agreement for the provision of special education and related services with state or local education agencies which, with respect to any aspect of the cooperative special education program, discriminates or has the effect of discriminating, against any child on the basis of race, national origin, tribal affiliation, religion, sex, handicap or eligibility for services provided by the Bureau.

(c) The Director is responsible for ensuring that every Indian handicapped child participating in a cooperative special education program is provided a free, appropriate public education in the least restrictive environment consistent with the procedural safeguards required by § 31k.31.

§ 31k.80 Vocational education coordinator.

The Director shall within sixty (60) days from the effective date of this part designate a part-time or full-time employee of the Division of Exceptional Education who shall be responsible for the development of a model program of junior high school, and high school vocational education services to handicapped Indian children enrolled in schools to which this part applies.

§ 31k.81 Bureau of Indian Affairs Advisory Committee for Exceptional Children.

(a) The BIA Advisory Committee for Exceptional Children has been chartered under and is subject to the provisions of the Federal Advisory Committee Act, Pub. L. 92-463. The membership of the BIA Advisory Committee for Exceptional Children must be composed of persons involved in or concerned with the education of handicapped children. The membership must include at least one person representative of each of the following groups:

- (1) Handicapped individuals.
- (2) Teachers of handicapped children.
- (3) Parents of handicapped children.
- (4) State and local educational officials.
- (5) Special education program administrators.

(b) The advisory committee shall:

- (1) Advise the Director of unmet educational needs of Indian children;
- (2) Comment publicly on the annual program plan and rules or regulations proposed for issuance by the Director regarding the education of handicapped children and the procedures for distribution of funds under this part; and
- (3) Assist the Director in developing and reporting such information and evaluation.

(c) The advisory committee shall meet as often as necessary to conduct its business.

(d) By July 1 of each year, the advisory committee shall submit an annual report of panel activities and suggestions to the Director and the Assistant Secretary—Indian Affairs. This report must be made available to the public.

(e) Official minutes must be kept on all panel meetings and shall be made available to the public on request.

(f) All advisory committee meetings and agenda items must be publicly announced prior to the meeting, and meetings must be open to the public.

(g) Interpreters and other necessary services must be provided at committee meetings for committee members or participants.

(h) The advisory panel shall serve without compensation but will be reimbursed for reasonable and necessary expenses for attending meetings and performing duties.

§ 31k.82 Further guidelines and directives.

The Director shall from time to time issue guidelines and directives to further define, clarify, interpret and explain the requirements of this part.

William E. Hallatt,

Acting Deputy Assistant Secretary—Indian Affairs.

(FR Doc. 80-28988 Filed 9-29-80; 9:45 am)

BILLING CODE 4310-02-M

HANDICAPPED CHILDREN RESIDING
ON INDIAN LANDS OR WHOSE PARENTS
ARE IN THE MILITARY AND
EDUCATIONALLY DEPRIVED CHILDREN

Regulations Under
Federal Impact Aid Program

43 Fed. Reg. 19757 (May 8, 1978)*

*With the organization of the new U.S. Department of Education, all regulations concerning education have been recodified. These regulations now appear at 34 C.F.R. 222.

(4110 02)

Title 45—Public Welfare

CHAPTER I—OFFICE OF EDUCATION;
DEPARTMENT OF HEALTH, EDUCATION,
AND WELFAREPART 115—SCHOOL ASSISTANCE IN
FEDERALLY AFFECTED AREAS

Final Regulation

AGENCY: Office of Education, Department of Health, Education, and Welfare.

ACTION Final Regulation.

SUMMARY: This document sets forth the requirements governing the awarding of Federal assistance to school districts related to certain types of children receiving free public education in areas affected by Federal activities. They are being promulgated to bring current regulations into conformance with the amendment to Pub. L. 81-874 made by Pub. L. 93-380. The effect of the regulation is to provide entitlements for handicapped children residing on Indian lands or whose parents are in the uniformed services and for educationally deprived children who live in and/or whose parents are employed on federally assisted low-rent public housing property.

EFFECTIVE DATE: Pursuant to section 451(d) of the General Education Provisions Act, as amended (20 U.S.C. 1232(d)), this regulation has been transmitted to the Congress concurrently with the publication in the Federal Register. That section provides that regulations subject thereto shall become effective on the forty-fifth day following the date of such transmission, subject to the provisions therein concerning Congressional action and adjournment.

FOR FURTHER INFORMATION
CONTACT:

William I. Stornier, Division of School Assistance in Federally Affected Areas; telephone 202-245-8427.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 305(a)(1) of the Education Amendments of 1974 revised section 3 of Pub. L. 81-874, which covers the computation of entitlements based on numbers of federally connected children and section 305(a)(2) revised section 5, which covers the allocation of payments authorized under Pub. L. 81-874, the Impact Aid Program.

Section 3(d)(2)(C) of the Act provides for increased assistance for handicapped children who reside on Indian lands or who have a parent in the uniformed services. The regulation

explains the method of computing entitlements for these children and establishes cost in requirements for using these funds. Section 5(c)(3) of the Act provides that funds may be paid to an applicant agency for special programs for educationally deprived children. These funds are paid on the basis of the number of children who reside in and/or with a parent employed on eligible low-rent housing property. There are two entitlements relating to handicapped children and children associated with low-rent housing are treated, respectively, in Subpart II, formerly published as § 115.19, and in Subpart I, formerly published as § 115.29 in the notice of proposed rulemaking.

I. MAJOR ADDENDMENTS TO THE
REGULATION

A. Subpart II—Handicapped Children and Children With Specific Learning Disabilities.

Subpart II sets forth provisions affecting the determinations for increased entitlements under section 3(d)(2)(C) of the Act and the use of funds attributable to these payments. Certain terms such as "handicapped children" and "children with specific learning disabilities" are defined in § 115.70(c). These are the definitions used in the Education of the Handicapped Act. Eligibility requirements for counting children for these purposes are that these children must have a parent on active duty in the uniformed services or reside on Indian lands and must be receiving services suited to their educational and related needs on the basis of the statutory requirements for these services (§ 115.71(a)).

In determining whether programs for children counted under this provision would meet the statutory requirement of being "sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational and other related needs of such children," the standards of the State in which the local educational agency is situated would apply (§ 115.72(a)). However, these State standards must conform to the policies and procedures established under sections 612 and 613 of the Education of the Handicapped Act (§ 115.73(b)). Applicants seeking to count children under this provision are required under § 115.73(b) to submit an assurance that these children are receiving appropriate services, and this assurance would have to be certified by the division in the State educational agency charged with the supervision of the programs under local auspices. Thus, in certifying programs which provide services for children counted under this provision of Pub. L. 81-874, each State shall apply its own standards for the program's so

long as the State standards comply with the requirements of sections 612 and 613 of the Education of the Handicapped Act.

Section 412(b) of the General Provisions Act (20 U.S.C. 1225(b)) is applicable to Pub. L. 81-874 funds attributable to handicapped children or children with specific learning disabilities. Application of this provision will permit recipient local educational agencies to use funds through the fiscal year following the fiscal year for which the funds were appropriated.

B. Subpart I—Entitlements Related to Low Rent Public Housing.

Subpart I sets forth requirements to ensure that payments made under Pub. L. 81-874 based on the number of children residing on or residing with a parent employed on low-rent public housing property, as determined under section 5(c) of the Act, are used for special programs and projects designed to meet the special educational needs of educationally deprived children from low income families.

Section 115.81(b) establishes the following order of priority for the use of these funds:

- (1) To be used for Title I, ESEA programs and projects that would be diminished or discontinued because of the new Title I allocation formula adopted under Pub. L. 93-380, where such a determination is possible; or
- (2) To provide Title I programs and projects in eligible Title I areas which otherwise would be unfunded;
- (3) To supplement existing Title I programs;
- (4) To provide Title I type programs for educationally deprived children in attendance areas of the local educational agency that do not meet the eligibility requirements under Title I, ESEA.

With regard to the first priority, it is recognized that it may not be possible for a school district to attribute the elimination or reduction of a particular program to the adoption of the new Title I, ESEA formula. In these instances, these funds must be used in unfunded eligible attendance areas, if any. Only when these needs have been fully met may the funds be used to provide Title I type programs. Furthermore, if there are no unfunded eligible areas, the school district may use funds in accordance with the last two priorities. School districts are encouraged to serve ineligible areas in the order established for Title I. The use of these funds to further Title I purposes is prescribed in the legislative history of the provisions (S. Rept. 93-1026, p. 162 (1974)).

In administering section 5(e), the Office of Education utilizes the personnel and organizational structure already involved in the provision of Title I type services in order to avoid a duplication of administrative func-

tions. Applications are submitted through the State educational agency, according to procedures under § 115.11. However, it will be necessary for the applicant to obtain certification from the State Title I component regarding the applicant's assurance that these funds are to be used in Title I or Title I-type programs in conformity with this regulation. Monitoring is to be done by the State educational agency Title I monitoring component. This will avoid duplication of monitoring in programs where most of these funds are expected to be used.

2. COMMENTS ON THE PROPOSED REGULATION

Interested parties were given 30 days in which to submit written comments, suggestions, or objections regarding the proposed final regulation. The Notice of Proposed Rulemaking was published in the FEDERAL REGISTER on December 5, 1975. A summary of the comments and responses follows. The comments are arranged in order of the subparts of the final regulation to which they apply. For additional clarity, reference section numbers are included in this response to comments as they appear in the regulation followed by the section numbers in brackets () as they appeared in the notice of proposed rulemaking.

A. Subpart H—Entitlements Related to Handicapped Children. *Comment.* One commenter declared that § 115.71 (§ 115.28), on entitlements related to handicapped children of uniformed services personnel, was inconsistent with recent Federal legislation on education of the handicapped and should conform to it. The commenter, however, did not specify the particulars to which he referred.

Response. No change has been made in the regulation. The regulation is consistent with the Education of the Handicapped Act, from which the definitions in § 115.10 (§ 115.28) of "handicapped children" and "children with specific learning disabilities" are taken.

Comment. Two commenters observed that § 115.71 (§ 115.28(c)(1)) restricts eligibility, for being counted for the purpose of an increased entitlement under section 3(d)(2)(C) of the Act to handicapped children and children with learning disabilities, limiting eligibility to those who have a parent on active duty in the uniformed services and excluding children who live on Indian lands. The commenters referred to section 3(d)(2)(C)(b) of Pub. L. 81-874 with respect to those children for whom a determination is made under section 3(a)(2) and stated that section 3(d)(2)(C) did not mention uniformed services. They also pointed out that children residing on Indian lands comprise the second of two groups of children and are in addi-

tion to those with a parent on active duty in the uniformed services for whom a determination is made under clause (2) of section 3(a). The commenters argued that the law, on the surface, did not allow a ruling that would authorize a distinction between the treatment of the handicapped children of uniformed services personnel and handicapped children living on Indian lands.

Response. The regulation has been changed. The interpretation of the commenters was sustained in *Chinle Common School District v. Mathews*, Civil No. 76-1273 (DC, D.C., 1976). The regulation allows school districts to be compensated for handicapped children of uniformed services personnel or for those who reside on Indian lands under section 3(d)(2)(C).

Comment. One commenter remarked that the submission of information required in § 115.72 (§ 115.28(d)) should be undertaken if and when requested by the Commissioner. The section states that an applicant which claims an increased entitlement under section 3(d)(2)(C) of the Act shall be required to submit information the Commissioner may deem necessary to substantiate compliance with this condition. The commenter said that this information may not be needed from all applicants requesting an increase in entitlement.

Response. The regulation has been clarified to meet the concerns of the commenter. An applicant need not submit the information in the application but may be asked to do so later to assure compliance with the regulation.

Comment. One commenter stated that § 115.73(b) (§ 115.29(c)), in effect, imposed a State plan on local educational agencies, and the commenter declared that the law did not require State approval for each administrative action by a local educational agency, and that no Congressional committee had contemplated or discussed the idea of a State plan for aid under Pub. L. 81-874.

Response. No change has been made in the regulation. The regulation provides for the application of State standards to the programs provided by local educational agencies in which the handicapped children and children with specific learning disabilities are participating. Legislative history indicates that Congress contemplated that State standards would be sufficient for certifying these programs if they were in line with Education of the Handicapped Act requirements.

House Report No. 93-805 states, on page 45, with reference to the programs provided by local educational agencies for eligible children, that the determination of scope, and quality shall be based upon the individual State's standard, for certification of these programs, and that each State

must certify the particular programs. That report further indicates that the Commissioner must also require satisfactory assurance that all local educational agency programs for handicapped children counted under that part are in compliance with requirements now set forth under sections 612 and 613 of the Education of the Handicapped Act.

For the purposes of Pub. L. 81-874, the State merely has to certify conformance of the applicant's program with the policies and procedures required under the Education of the Handicapped Act.

Comment. One commenter objected to the citation in § 115.73(b) (§ 115.28(d)) of section 613(a) of the Education of the Handicapped Act stating the citation did not apply to Pub. L. 81-874 since it set forth procedures for qualifying for a grant under a State plan when Pub. L. 81-874 did not require.

Response. A clarification has been made in the wording in the regulation. As the previous response indicates, the legislative history makes clear that Congress intended that programs for handicapped children and children with learning disabilities under section 3(d)(2)(C) of the Act were to conform to policies and procedures required under the Education of the Handicapped Act.

B. Subpart I—Low-rent Housing Entitlements. *Comment.* Two commenters brought up the question of children eligible to be counted in computing entitlements pertaining to low-rent public housing, but who do not attend school in the district in which they live, or who attend school outside the area eligible for Title I aid. One commenter said a statement was needed under § 115.82 (§ 115.29) to the effect that "the money follows the child," as he said was provided by Title I regulations. The other commenter said that these children were excluded from sharing in any benefits from funds that their presence helped to bring to the school district.

Response. No change has been made in the regulation. Section 3(a) of Pub. L. 81-874 states that children, in order to be included among the number for whom a determination is made for the entitlement computation, are to have been in average daily attendance at the schools of the applicant agency that provided free public education for them. The use of payments made to a local educational agency under section 5(e) may include the provision of educational benefits to educationally deprived children from low income families who do not live or work on low-rent public housing property. The statute does not limit the use of funds to children counted for entitlement purposes. It is possible that children may not receive services even though

their enrollment occasioned payments to their school district.

Comment. One commenter raised the issue whether children of families receiving welfare payments and living in public housing projects should be classified under section 3(a) or 3(b) of the Act. The commenter said that the proposed regulation failed to provide guidance on that question. The commenter argued that students living in housing projects whose parents receive welfare should be counted under section 3(a). The commenter said that counting those students under section 3(a) rather than 3(b) would agree with the intent of Congress because it would restore funds lost to local school systems through the change made by Pub. L. 93-380 in the formula for the distribution of assistance under Title I of the Elementary and Secondary Education Act. The commenter also said that including children under 3(a) would be consistent with the distinction drawn by section 3 of Pub. L. 81-874 between parents who lived and worked on Federal property and those who met only one of those conditions because, usually being unemployed, those parents make no indirect contribution to the tax revenues of local educational agencies. Families on welfare living on low-rent public housing property are more like the families classified under section 3(a) than 3(b).

Response. No change has been made in the regulation. Whether a child living in low-rent public housing with a parent who receives welfare payments should be counted under section 3(a) of the Act is governed by the provision of that section and not section 5(c)(3). The legislative history of section 3 clearly indicates that children living in federally assisted low-rent public housing are not to be considered section 3(a) children without a second "Federal connection" (H. Rept. 93-805, p. 42 (1974)). To include a child living in low-rent public housing in the number determined under section 3(a), the child's parent must be employed on Federal property or be on active duty in the uniformed services.

Comment. A commenter said that §115.81 (§115.29) made the public housing provisions a categorical Title I program. The commenter said that although the reports mentioned services to the kinds of children designated in Title I, legislation was not included in Pub. L. 81-874. If Congress had intended funds to be paid under Title I procedures for students in public housing, Part C of Title I would have been completely retained, and provisions for public housing students would have been added as an additional program.

Response. No change has been made in the regulation. The legislative history clearly relates the use of these payments to Title I or Title I-type services.

Comment. One commenter expressed concern that §§115.74 (§115.23) and 115.81 (§115.29) on entitlements relative to handicapped children and to low-rent public housing might require a local educational agency to budget and spend funds in the amount of estimated entitlements for these categorical purposes before actual receipt of even partial payments for those entitlements. The commenter said that such a requirement would be an extreme hardship for any local educational agency, particularly during periods when borrowing costs are excessive.

Response. No change has been made in the regulation. The comment appears directed not to the regulation, but to the practical consequences of Pub. L. 81-874 funds being unavailable for payment until sometime later in the school year. Payments will be made in accordance with established procedures. However, school districts may use these funds in the fiscal year following the year for which they were allocated. This gives the recipient school district the choice of holding the funds for future expenditure or of reimbursing itself for funds already spent.

Comment. One commenter stated that the provision in §115.81 (§115.29) relating to low-rent public housing entitlements were stated too generally. The commenter asked whether funds had to be expended within a given period and whether evaluations like those of Title I would be necessary. The commenter felt the intent of the legislation would be lost if it had to conform both to Pub. L. 81-874 and to Title I, ESEA.

Response. The regulation has been rewritten in part to be more specific and to reflect changes made in response to public comments or administrative reconsideration of the proposed rule. Funds must be expended by the end of the fiscal year succeeding the fiscal year for which they were allocated. Evaluations like those required under Title I must be made annually (§115.86). It is clear from the legislative history that Congress intended that section 5(c) funds would provide a Title I-type program. Thus, it is appropriate that basic Title I type provisions apply to the use of these funds in order that purposes similar to those of Title I will be fulfilled.

Comment. A commenter said the regulation in §115.84(b) (§115.29) seemed to require a value judgment in determining whether any needs were unmet in Title I, ESEA areas. He said there were always many unmet needs because the application of Federal Title I and State requirements restricted possible program endeavors to a very narrow range of eligible reading activities.

Response. No change in the regulation has been made. There is a pre-

sumption of unmet needs in eligible areas which have approvable projects but do not have Title I assistance. Until those needs are filled, funds resulting from entitlements relative to low-rent public housing may not be spent in non-Title I attendance areas.

Comment. A commenter cited section 421(c)(2)(B) of the General Education Provisions Act to contest that either Pub. L. 81-874 or Title I, ESEA gave State educational agencies authority over the use of funds for Pub. L. 81-874. Section 421(c)(2)(B) of the General Education Provisions Act prohibits any limitation on the use of funds to carry out any applicable program other than limitations imposed by the law authorizing the appropriation or a law controlling the administration of the program.

The commenter further pointed out that section 421(c)(1)(C) of the General Education Provisions Act forbids the commingling of funds from two different appropriations and provides conditions for the approval of an application for funds from an appropriation that is based upon criteria other than those for which provision is made in the law authorizing the appropriation. The commenter said nothing in Pub. L. 81-874 gives any State agency approval authority or imposes Title I, ESEA requirements. In the opinion of the commenter, section 5(c)(3) simply provides that funds derived from entitlements based on children from low-rent public housing must be used for special programs and projects designed to meet the special educational needs of educationally deprived children from low-income families. In addition, the commenter argued that the imposition by §115.81 (§115.29) of rigid priorities on the types of projects to be funded was based on an expression of intent that was not the law, that could not override section 421(c)(1) of the General Education Provisions Act, and that could not be used to create a new administrative mechanism and impose new requirements.

Response. No change has been made in the regulation. While certain requirements of the regulation may not be explicitly set out in the statute, they are, nevertheless, clearly set forth in the legislative history of the statute. The purpose of interpreting and implementing any statute is to effect the will of the legislature. To disregard the express will of Congress as reflected in the Committee reports, in this instance, would operate to defeat the purposes for which this provision was adopted. Therefore, this regulation does not conflict with section 421(c)(2)(B) of the General Education Provisions Act. Furthermore, since the funds provided under section 5(c)(3) of Pub. L. 81-874 will be subject to separate accounting from funds

provided under Title I, ESEA, the use of these funds in jointly funded projects would not constitute commingling.

Comment. One commenter expressed support for the priorities in §115.81(b) [§115.29(b)(1)] regarding the use of funds under section 5(e) and for the ban stated in §115.81(e) [§115.29(c)] against the consolidation of those funds with other payments under the Act or with funds from other sources. The commenter also stated a concern that the phrase "shall serve only . . . educationally deprived children from low-income families" was subject to an interpretation that would require children from low-income families served with funds authorized under the Act to be segregated from other educationally disadvantaged pupils. The commenter characterized as potentially inconsistent the use of the word "only" and the stipulation that the criteria for the participation of the children approximate those with respect to Title I, ESEA.

The commenter pointed out that under Title I, ESEA, schools and not children are selected to receive funds on the basis of the poverty of the residents of the area, and the children in those schools participate on the basis of educational need whether or not their families are impoverished. The commenter said that he did not believe that Congress intended section 5(e)(3) to result in the stigmatization or identification of low-income students receiving remedial services. The commenter expressed the view that section 5(e)(3) deals with the design of programs rather than the delivery of services and does not compel the restriction of compensatory services only to low-income children.

Response. The regulation has been changed in response to the comment. There is no indication of Congressional intent to exclude from the services of these projects, children who are educationally deprived in other ways besides being from low-income families. The evident intent that the provisions of Title I, ESEA and section 5(e) be coordinated implies the inclusion not only of children from low-income families, but also of all educationally deprived children in participation in the benefits of these programs.

Comment. A commenter said he interpreted §115.29(b)(2) of the proposed rule to mean that the amount of payment would be used to benefit all children of low-income families. This would involve dual criteria for serving the same children as served by Title I, ESEA. He recommended changing the phrase "may consider" in the last sentence of the section to "shall only consider" to restrict the provision of services to the children of the stated categories.

Response. The regulation has been changed so that educationally deprived children from low income families are not distinguished from other educationally deprived children. All educationally deprived children may be served in programs assisted by section 5(e) funds. A local educational agency is not required to make low-income determinations under this program.

Comment. One commenter hoped the text of §115.81(b) [§115.29(d)] could be republished in proposed rather than in final form after a determination had been made with respect to the sections of the Act and regulations of Title I of the Elementary and Secondary Education Act that do not apply to the activities authorized by Pub. L. 81-874.

Response. No change in the regulation is necessary. Certain sections of the Title I regulations and statutory provisions were mentioned in the notice of proposed rulemaking as possibly inapplicable to this regulation. Some interested parties did respond to the request for further suggestions, objections, and comments as to which of these Title I provisions should apply. The public interest would not be served to delay the final promulgation of this regulation and thereby keep recipients from receiving authoritative guidance in making plans for the use of funds during the school year.

Comment. Certain comments addressed the applicability of particular Title I, ESEA requirements to activities conducted in accordance with section 5(e) of the Act regarding public low-rent housing funds. One commenter opposed the suggested exclusion of 45 CFR 116.4(b), which allows spending one percent of the Title I allocation on State administrative expenses. The commenter felt that including this section would emphasize the States' obligation to monitor the compliance of local educational agencies in restricting use of funds to special programs and projects designed to meet the special educational needs of educationally deprived children from low-income families. The commenter pointed out that, although Pub. L. 93-380 authorized no funds for State administrative costs, the notice of proposed rulemaking stated, "The Office of Education plans to utilize the personnel and organizational structure already involved in the provision of Title I type services in order to avoid a duplication of administrative functions." The commenter said it was appropriate to treat State administrative expenses directly attributable to the monitoring of programs under section 5(e)(3) as permissible Title I State administrative expenses.

Another commenter protested that the one percent allowance was not

nearly enough to provide the services and meet the demands that the Office of Education placed on the State educational agency for the administration of Title I, ESEA, and insisted that a more realistic amount be specified.

Response. No change has been made in the regulation. Funds appropriated for Pub. L. 81-874 are provided entirely for making payments to eligible local educational agencies. There is no authority for the Commissioner to allocate any funds to which local educational agencies are entitled to State educational agencies. Therefore, no question remains in regard to the Commissioner's authority to provide more than 1 percent. The States have already assumed certain administrative duties and expenses for which it is not reimbursed by Pub. L. 81-874 funds.

Comment. A commenter said it was not understood why the principle in §116.20 regarding Title I, ESEA, and in section 434(c) of the General Education Provisions Act, providing that further payments not be made to delinquents until they complied with the terms of their grants, should not apply to misexpenditures of section 5(e)(3) funds and Title I funds.

Response. No change has been made in the regulation. Section 434(c) of the General Education Provisions Act applies to all applicable Federal education assistance programs, including Pub. L. 81-874. Therefore, it is not necessary to provide for this in the regulation.

Comment. A commenter argued that it was unnecessary to exclude from section 5(e)(3) the applicability of provisions of 45 CFR 116.38(a) with respect to expenditures for property. The specific reference to the purposes of Title I in section 5(e)(3) could be interpreted to mean the purpose common to both Title I and section 5(e)(3) in meeting the special educational needs of educationally deprived children.

Response. The regulation has been amended in accordance with the suggestion of the commenter.

Comment. A commenter felt §115.81 [§115.29] should be amended to allow the expenditure in the current fiscal year of funds allocated in the previous year, as in the case under Title I, ESEA regulations.

Response. The regulation has been changed in response to the comment.

Comment. A commenter recommended a change in §115.81(b) [§115.29] to extend the effectiveness of the provisions under Title I in regard to indirect cost of the operation of programs under section 5(e).

Response. The regulation has been changed to provide that Part 100c of Title 45 CFR dealing with indirect cost apply to programs under section 5(e).

Comment. A commenter said, in reference to §115.81 [§115.29(e)], that

\$11 million made it worth the while of his local educational agency to endure the extreme complexity and time consumption of the application process under Title I and the expense of the application, monitoring, reporting, and evaluation processes required by the law. Declaring his understanding that funds under Pub. L. 81-874 must remain identifiable for accountability purposes and that an entirely new accounting system would be required for any added programs, the commenter said it was questionable whether a grant about one-sixtieth (1/60) of the Title I amount would be worth the effort.

Response. The regulation has been changed so that, under section 5(e)(3), a description of a proposed project is required, rather than an application. If a project supplements an existing Title I project, only that part funded under section 5(e)(3) need be described. Accountability cannot be waived for these categorical funds.

Comment. A commenter asserted that there was no requirement under Pub. L. 81-874, as amended by Pub. L. 93-380 for the State to monitor programs of aid to federally affected areas and demanded that this requirement and all others relevant to it be dropped. The commenter said that the law required only assurances; anything in addition was not authorized. The commenter added that if Congress had wanted to give additional authority to the Office of Education or the Commissioner, it would have done so as it did in section 3(d)(2)(C)(ii) of Pub. L. 81-874, as amended by Pub. L. 93-380.

Another commenter favored the use of the regular State Title I monitoring components rather than the use of special services contracts between the Office of Education and the State agencies to implement the injunction that the State agency notify the Commissioner if a local educational agency has failed to comply with the terms of its application. The commenter expressed the view that, in most instances, local educational agencies would replace former ESEA Title I programs with others under section 5(e)(3), that the cost of monitoring the section 5(e)(3) programs might be considered part of a State's expenses in administering the Title I program, and that funds allocated to programs under section 5(e)(3) should not be diverted to fund special service contracts.

Response. The regulation has been rewritten to specify that the State educational agency should monitor the expenditures of section 5(e) funds by applicants. The Conference Report, Senate Rept. No. 93-1026, states on page 162, "The State education agency should monitor the expenditures of these funds for public housing since

that agency has responsibility for monitoring the expenditure of Title I, ESEA."

Note.—The Office of Education has determined that this document does not contain a proposal requiring preparation of an Inflation Impact Statement under Executive Order 11821 and OMB Circular A-107.

(Catalog of Federal Domestic Assistance Program No. 13.478, School Assistance in Federally Affected Areas—Maintenance and Operation.)

Dated: January 18, 1978.

ERNEST L. BOYER.

U.S. Commissioner of Education.

Approved: April 26, 1978.

JOSEPH A. CALIFANO, Jr.,

Secretary of Health,
Education, and Welfare.

Part 115 is amended by adding Subpart H and Subpart I to read as follows:

Subpart H—Handicapped Children and Children With Specific Learning Disabilities

Sec.

- 115.70 General.
- 115.71 Eligibility requirements.
- 115.72 Application procedures.
- 115.73 Assurances and certifications.
- 115.74 Use of section 3(d)(2)(C) funds.
- 115.75 Per pupil expenditure requirement.
- 115.76 Relation to section 5(d)(2) of the Act.
- 115.77 Children in private schools.
- 115.78 Individualized educational programs and parental involvement.
- 115.79 Applicability of other statutory and regulatory requirements.

Authority: (20 U.S.C. 238, 240, 242(b)).

Subpart H—Handicapped Children and Children With Specific Learning Disabilities

§ 115.70 General.

(a) **Scope.** The regulation in this Subpart governs the provision of financial assistance to local educational agencies which provide free public education to handicapped children who are claimed under section 3(d)(2)(C) of the Act. The regulation, however, is not alone in governing the relationship between the local educational agency and the handicapped child. Other statutes and regulations which may be pertinent in a particular instance are section 504 of the Rehabilitation Act of 1973 (20 U.S.C. 706 and 45 CFR Part 84 ff.), the Education of the Handicapped Act, as amended by the Education for All Handicapped Children Act of 1975 (20 U.S.C. 1401 et seq and 45 CFR Part 121 ff.), and section 121 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241c-1 and 45 CFR Part 116).

(b) **Purpose.** The purpose of the regulation in this Subpart is to set forth the requirements, interpretations, and guidance necessary to implement section 3(d)(2)(C) of the Act.

(c) **Definitions.** For the purposes of this Subpart, the following terms are defined as indicated:

(1) "Children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. These disorders include conditions such as perceptual handicaps, brain injury, minimal brain disfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, or of environmental, cultural, or economic disadvantage.

(2) "Education of the Handicapped Act" means Pub. L. 91-230, as amended (20 U.S.C. 1401 et seq.).

(3) "Free public education" means free appropriate public education as used in the Education of the Handicapped Act and as defined in 45 CFR 121a.4. In particular, this means special education and related services which:

(a) Are provided at public expense, under public supervision and direction, and without charge,

(b) Meet the standards of the State educational agency, including the requirements of this part,

(c) Include preschool, elementary school, or secondary school education in the State involved, and

(d) Are provided in conformity with an individualized education program which meets the requirements under 45 CFR 121a.340-121a.389.

(4) "Handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired, deaf-blind, multi-handicapped children, or as having specific learning disabilities, who because of those impairments need special education and related services.

(5) "Preschool program" means an educational or related program encompassing the educational level from a child's birth to the time at which elementary education is provided as determined under State law, provided that this program is recognized as free public education under State law.

(6) "Related needs" means those needs related to a handicap or specific learning disability for which related services, in addition to direct instructional services, are deemed necessary so that the child may effectively participate in the instructional program of the local educational agency.

(7) "Related services" means transportation and other developmental,

corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that these medical services shall be for diagnostic and evaluation purposes only) required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

(20 U.S.C. 238(d)(2)(C).)

§ 115.71 Eligibility requirements.

(a) In order that a handicapped child may be counted for the purpose of an increased entitlement under section 3(d)(2)(C) of the Pub. L. 91-874, the Act requires that a child must—

(1) Have a parent on active duty in the uniformed services, as defined by section 101 of Title 37 United States Code, or

(2) Reside on Indian lands, as described in section 403(1)(A) of the Act;

(3) Be receiving services suited to the child's special educational and related needs; and

(4) Be enrolled in a program (including a preschool program if appropriate) which is of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the child's special educational and related needs provided as part of free public education in the local educational agency.

(b) The applicant agency must meet the regular eligibility requirements of Pub. L. 91-874 under section 3(c) to receive the increase in entitlement under section 3(d)(2)(C). However, there is no minimum number of handicapped children who must be served for the agency to receive the increase in entitlement.

(c) The program provided the handicapped children claimed under section 3(d)(2)(C) of the Act must conform to State standards for programs for handicapped children and must encompass the specific educational and related needs of the children claimed.

(20 U.S.C. 238(a)(b)(d)(2)(C), 240(f), Sen. Rept. No. 93-1026, p. 159 (1974); *Chinle Common School District v. Mathews*, Civil No. 76-1273 (D. D.C., 1978).)

§ 115.72 Application procedures.

(a) The applicant agency must state the number of handicapped children it claims under section 3(d)(2)(C) of the Act in the application filed in accordance with procedures set forth in Subpart B of this regulation published separately.

(b) The applicant agency must provide the assurances and certifications required under § 115.73 of this subpart as part of the application mentioned in paragraph (a).

(c) The Commissioner may require information in addition to that con-

tained in the application in order to substantiate compliance with assurances provided with the application.

(20 U.S.C. 238(d)(2)(C), 242.)

§ 115.73 Assurances and certifications.

(a) *Size, scope, and quality of the programs.* (1) For each applicant for assistance under the Act which is based in any part upon children who are counted under section 3(d)(2)(C) of the Act, the applicant agency must provide an assurance that these children are receiving services in programs (including preschool programs) which are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational and related needs of these children. The Commissioner will consider any special education program serving the special educational needs of these children which conforms to the requirements for special education programs under Part B of the Education of the Handicapped Act as satisfying the assurance.

(2) For each application containing the assurance required by paragraph (a)(1) of this section, the applicant agency must also provide a certification from its State educational agency that the particular program(s) provided by the applicant conform(s) to State standards for programs for these types of children.

(b) *Education of the Handicapped Act requirements.* (1) For each applicant for assistance under the Act which is based in any part upon a determination under section 3(d)(2)(C) of the Act, the applicant agency must provide an assurance that the programs designed to meet the special educational and related needs of children determined under that section conform to the policies and procedures required in fulfillment of requirement under sections 612 and 613 of the Education of the Handicapped Act.

(2) For each application containing the assurance required by paragraph (b)(1) of this section, the applicant agency must provide a certification from the State educational agency that the program provided by the applicant conforms to the requirements of sections 612 and 613 of the Education of the Handicapped Act.

(3) In undertaking any further determination whether these State standards and programs conform to the policies and procedures required under sections 612 and 613 of the Education of the Handicapped Act, the Commissioner shall consult with persons in charge of special education programs for handicapped children and children with specific learning disabilities in the State education agency.

(20 U.S.C. 238(3)(2)(C); H.R. Rept. No. 93-805, pp. 43-46 (1974); Sen. Rept. No. 93-1026, p. 45 (1974). Cong. Record, daily ed., H7396, July 31, 1974)

§ 115.74 Use of section 3(d)(2)(C) funds.

(a) *General.* Section 5(f) of the Act requires that the amount of a payment to an applicant which is attributable to a determination under section 3(d)(2)(C) of the Act must be used for special programs and projects designed to meet the special educational needs of the children counted under that provision. Only payments related to the increase in entitlement affected by section 3(d)(2)(C) must be used in this manner. Payments related to the basic entitlement provided under section 3(c) for those children do not have to be used in this manner.

(20 U.S.C. 240(f))

(b) *Duration of availability of funds.* An applicant may obligate and expend funds received for section 3(d)(2)(C) until the end of the fiscal year succeeding the fiscal year for which they were appropriated. The recipient agency must return those funds to the U.S. Office of Education that it has not obligated by the end of that period.

(20 U.S.C. 1225(h))

(c) *Methods of obligation and expenditure of funds.* Obligations and expenditures may be incurred for the uses authorized under section 5(f) of the Act and paragraph (a) of this section in either of two ways:

(1) The applicant agency may reimburse itself for obligations or expenditures from local funds already made during the fiscal year for which the funds were appropriated or during the following fiscal year. Those obligations or expenditures must have been for appropriate programs or projects serving the children from whom the funds under section 3(d)(2)(C) were paid; or

(2) The applicant agency may obligate or spend these funds on a current basis during the fiscal year for which the funds were appropriated or during the following fiscal year. The obligations or expenditures must be for programs or projects serving the children for whom the funds under section 3(d)(2)(C) were paid.

(20 U.S.C. 238(d)(2)(C), 240(f), 242)

(d) *Allowable expenditures.* An agency receiving funds under section 3(d)(2)(C) of the Act shall use those funds for the following types of expenditures:

(1) Expenditures which are reasonably related to the conduct of programs or projects for the education of handicapped children which meet the requirements of this section. These expenditures may include planning, evaluating and disseminating of the results of those programs or projects but may not include the construction of school facilities;

(2) Expenditures for equipment to meet the special educational needs of

the handicapped children counted under section 3(d)(2)(C). If funds received under section 3(d)(2)(C) of the Act are used for the acquisition of equipment and any financial advantage is realized through bargains, rebates, discounts, bonuses, free pieces of equipment (not used in the program or project covered by this paragraph) or other circumstances, the fair market value of that financial advantage is not an allowable expenditure and shall not be credited as an expenditure of those funds.

In no case may funds provided by section 3(d)(2)(C) be used to acquire equipment when the title to that equipment would be in a private school and not in the applicant agency.

(e) *No supplanting of State funds.* The use of funds provided under section 3(d)(2)(C) of the Act shall not supplant any State funds which were or would have been available to the applicant agency for the free public education of children counted under section 3(d)(2)(C).

(1) The applicant agency must spend at least the same amount, per pupil, of State general aid funds and State handicapped education funds on children counted under section 3(d)(2)(C) as it does for other similarly handicapped children enrolled in the schools of the agency.

(2) A reduction in the amount, per pupil, of State aid spent on children counted under section 3(d)(2)(C) of the Act from that spent in a previous year raises a presumption that supplanting has occurred. This presumption may be rebutted by the applicant agency demonstrating that an equivalent reduction was made in the amount, per pupil, spent on other handicapped children enrolled in the schools of the agency.

(20 U.S.C. 235, 238, 240 and 242(b).)

§115.75 Per pupil expenditure requirement.

(a) *Expenditures for children eligible under section 3(d)(2)(C).* Expenditures per pupil by an applicant agency from State, local, and section 3(d)(2)(C) funds for handicapped children enrolled in programs serving children counted under section 3(d)(2)(C) must be greater than the expenditure per pupil for all children, other than handicapped children, receiving free public education in the schools of that agency.

(b) *Computation.* In determining whether an agency fulfills the requirement stated in paragraph (a) of this section, the following computations must be made:

(1) Divide the total current expenditures from State, local, and section 3(d)(2)(C) funds for special educational programs by the total number of

children who are being served in the special educational programs of the agency.

(2) Divide the total current expenditures from State and local funds for children receiving a free public education from the agency who are not handicapped children by the total number of those children who are not handicapped.

(3) If the figure obtained under paragraph (b)(1) exceeds the figure obtained in paragraph (b)(2), the applicant agency has fulfilled the requirement of paragraph (a) of this section.

(c) *Records and information required of an applicant agency.* An applicant agency which receives funds under section 3(d)(2)(C) must keep records of the expenditures for children receiving a free public education in its schools in such a manner to permit the computation set forth in paragraph (b) of this section. Furthermore, when requested, that agency must furnish to the Commissioner whatever information or data the Commissioner considers necessary to substantiate compliance with the requirements of this section.

(20 U.S.C. 238(d)(2)(C), 240(f); H. Rept. No. 93-763 p. 45 (1974).)

§115.76 Relation to section 5(d)(2) of the Act.

(a) Section 5(d)(2) of the Act provides that States having a State aid program designed to divide expenditures for children equally among local educational agencies in the State, which conform to Subpart B, may consider payments received by an agency under Pub. L. 81-874 as local resources in determining the need for or the amount of State aid allocated to that agency. A regulation setting forth these standards appears in Subpart B of this part.

(b) Whether or not a State has a program of State aid that meets the requirements of section 5(d)(2) of the Act, payments provided under section 3(d)(2)(C) may not be considered by a State in determining the need for or the amount of State aid which will be allocated to a local educational agency receiving those payments.

(20 U.S.C. 238(d)(2)(C), 240(d), (f), 242(b).)

§115.77 Children in private schools.

(a) An applicant may place a handicapped child in, or refer a handicapped child to a private school or facility, so long as it follows the policies and procedures for doing so established under section 613 of the Education of the Handicapped Act. Regulations implementing those policies and procedures are set forth in 45 CFR §121a. The applicant must have placed the handicapped child in, or have referred the children to, the pri-

ate school or facility that he or she is attending in order for the child to be counted under section 3(d)(2)(C) of Pub. L. 81-874.

(b) If placement in a public or private residential program is necessary to provide a free public education to a handicapped child because of his or her handicap, the program, including non-medical care and room and board, shall be provided at no cost to the child or his or her parents or guardian.

(c) Children who have been placed in private schools by the parents may participate in public school programs which use section 3(d)(2)(C) funds.

(20 U.S.C. 238, 240(f), 242(b); H. Rept. 93-763, p. 45 (1974).)

§115.78 Individualized educational programs and parental involvement.

(a) Each applicant must have in effect a written individualized educational program for a child counted under 3(d)(2)(C) of the Act. This program must:

(1) Be in effect before special education and related services are provided to the child; and

(2) Be implemented as soon as possible after meetings held for the purpose of developing, reviewing or revising the child's program.

(b) Each applicant must provide for the participation of and consultation with parents or guardians of handicapped children counted under section 3(d)(2)(C) of the Act in the children's educational development.

(c) Each applicant must take steps to insure the involvement of a handicapped child's parents or guardian in meetings held for the purpose of developing, reviewing or revising that child's educational program.

(d) Each applicant shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:

(1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(e) The notice under paragraph (d)(1) of this section must indicate the purpose, time, and location of the meeting, and who will be in attendance.

(f) If neither parent can attend, the applicant shall use other methods to insure parent participation, including individual or conference telephone calls.

(g) A meeting may be conducted without a parent in attendance if the applicant is unable to convince the parents that they should attend.

(h) The applicant shall take whatever action is necessary to insure that the parent understands the proceed-

ings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(1) The applicant shall give the parent, on request, a copy of the child's educational program.

(2) An applicant which satisfies, for children counted under section 3(d)(2)(C), the requirements of Part B of the Education of the Handicapped Act regarding the involvement of parents of handicapped children will have satisfied the requirements of this section.

(20 U.S.C. 238(d)(2)(C), 240(f), 242(b), 1231(d).)

§ 115.79 Applicability of other statutory and regulatory requirements.

(a) *Applicability of General Provisions Regulations.* Relevant provisions contained in parts 100a and 100c of this Chapter are applicable to programs conducted under section 3(d)(2)(C), with the following exceptions:

Sec.

100a.15 Applications for grants or contracts.

100a.26 Review of applications.

100a.27 Disposition of applications.

100a.31 Preapplications.

Subpart C—Application Forms for State and Local Governments

100a.54 Duration of Projects.

100a.62 Payment methods for nonconstruction projects.

100a.71 Checks paid basis letter of credit.

Subpart F—Financial Reporting Requirements

100a.405 Request for advance or reimbursement.

Subpart Q—Monitoring and Reporting of Program Performance

100a.432 Performance reports for nonconstruction projects.

(20 U.S.C. 1221c(b)(1); 20 U.S.C. 242(b); OMB Cir. A-102.)

(b) *Applicability of civil rights and related requirements.* Payments provided under section 3(d)(2)(C) are subject to the requirements of the following laws and regulations: Title VI of the Civil Rights Act of 1964 (45 CFR Part 80); Title IX of the Educational Amendments of 1972 (45 CFR Part 86); and section 504 of the Vocational Rehabilitation Act of 1973 (45 CFR Part 84).

(42 U.S.C. 200d, 20 U.S.C. 1681, 29 U.S.C. 794.)

Note: Sections concerning the educationally deprived and low-rent public housing removed.

FEDERAL REGISTER, VOL. 43, NO. 89—MONDAY, MAY 8, 1978

REGULATIONS UNDER SECTION 121 OF THE
ELEMENTARY AND SECONDARY EDUCATION ACT
CONCERNING STATE OPERATED PROGRAMS
FOR HANDICAPPED CHILDREN

43 Fed. Reg. 16261* (April 17, 1978)

*With the organization of the new U.S. Department of Education, all regulations concerning education have been recodified. These regulations now appear at 34 C.F.R. Part 302

[4110-02]

Title 45—Public Welfare

CHAPTER I—OFFICE OF EDUCATION,
DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE

PART 116b—STATE OPERATED PROGRAMS FOR HANDICAPPED CHILDREN

AGENCY: U.S. Office of Education, DHEW.

ACTION: Final regulation.

SUMMARY This final regulation governs grants under section 121 of the Elementary and Secondary Education Act, as amended, to State agencies which are directly responsible for providing free public education to handicapped children. Section 503 of The Education Amendments of 1972 requires the Commissioner to study and publish, among other things, all rules governing this program. This regulation provides guidance to State educational agencies, State agencies and local educational agencies relating to allocation, distribution and use of funds, and the transfer of funds to local educational agencies for handicapped children formerly counted in average daily attendance in State agency schools and who subsequently participate in appropriately designed educational programs operated or supported by local educational agencies.

EFFECTIVE DATE: Pursuant to section 431(d) of the General Education Provisions Act, as amended (20 U.S.C. 1232(d)), this regulation has been transmitted to the Congress concurrently with its publication in the *FEDERAL REGISTER*. That section provides that regulations subject thereto shall become effective on the forty fifth day following the date of such transmission, subject to the provisions therein concerning Congressional action and adjournment.

FOR FURTHER INFORMATION CONTACT:

Joyce P. Broome, U.S. Office of Education, Bureau of Education for the Handicapped, 400 Sixth Street SW, Room 4918, Donohoe Building, Washington, D.C. 20202, 202-245-9405.

SUPPLEMENTARY INFORMATION:

A. BACKGROUND; MAJOR ISSUES

1. *Introduction.* Notice of proposed rulemaking was published in the *FEDERAL REGISTER* on April 13, 1976 (41 FR 15532-15535) setting forth a proposed amendment to Title 45 of the Code of Federal Regulations, which would add a new part 116b to govern the Administration of State Operated Programs for Handicapped Children under sec-

tion 121 of Title I, Elementary and Secondary Education Act, as amended by Pub. L. 93-380; 20 U.S.C. 241c-1). These regulations set forth rules and criteria governing grants to State agencies which are directly responsible for providing free public education for handicapped children.

2. *Program Purpose.* Under section 121 of Title I of the Elementary and Secondary Education Act, as amended (originally added to Title I as section 103(a)(5) by Pub. L. 83-313), financial assistance is provided to State agencies for programs to meet the special educational needs of handicapped children in State-operated or State-supported schools. In addition, under subsection (d) of section 121, funds may now be made available by those State agencies to local educational agencies, under certain conditions, for handicapped children who have left a State agency program and are now enrolled in a local educational agency program.

3. *Section 503 Procedures and Effect.* Section 503 of the Education Amendments of 1972 (Pub. L. 92-318) requires the Commissioner to study all rules, regulations, guidelines, or other published interpretations or orders issued by him or by the Secretary after June 30, 1965, in connection with or affecting the administration of Office of Education programs, to report to the Committee on Labor and Public Welfare of the Senate and the Committee on Education and Labor or the House of Representatives concerning the study, and to publish in the *FEDERAL REGISTER* these rules, regulations, guidelines, interpretations, and orders, with an opportunity for public hearings on the matters published. The regulations below reflect the results of this study, as it pertains to the programs under section 121. Upon the effective date of part 116b, all preceding rules, regulations, guidelines, and other published interpretations and orders issued in connection with or affecting the program, except the Office of Education General Provisions Regulations and the general Title I regulations in part 116 of Title 45 of the Code of Federal Regulations, will be superseded. For example, all Information Bulletins issued by the Office of Education with respect to this program prior to that date, to the extent they contain this material, will be superseded.

4. *Effect of Office of Education General Provisions Regulations.* General fiscal and administrative rules for the program are provided under the Office of Education General Provisions Regulations (45 CFR parts 100, 100b, and 100c) which were adopted in connection with the same study under section 503 of the Education Amendments of 1972, of which this publication is a part. (Reference is made in particular to the provisions of parts

100b and 100c of Title 45 CFR containing general provisions for State administered programs, which are applicable to the programs under Title I of the Elementary and Secondary Education Act, as amended.)

5. *Reorganization of part 116.* In the past, this program has not had regulations separate from those in part 116. Under a recent reorganization, part 116 (as published in final form on September 23, 1976 (41 FR 42894-4 223)) is limited to those provisions that are applicable to all recipients, including State educational agencies under section 121 of the Act. Part 116a, published concurrently with part 116, provides the regulations which are applicable solely to the local educational agency program for educationally deprived children. Part 116b will provide the regulations which are applicable solely to the program for handicapped children under section 121. Part 116c (published as a formal regulation on July 13, 1977; 42 FR 36076-36085) governs the migrant program under section 122, and part 116d (published as interim final regulations on April 12, 1977, 42 FR 19286-19289) governs the program for neglected or delinquent children under section 123.

6. *Amendments to Title I.* The regulations set forth below implement amendments made to section 121 of Title I of the Elementary and Secondary Education Act by Pub. L. 93-380 (the Education Amendments of 1974) and amendments affecting the implementation of the program made by Pub. L. 94-482 (the Education Amendments of 1976).

(a) The following reflects the modification to the program required by Pub. L. 94-482: "Hold Harmless". Section 501(a) of Pub. L. 94-482 amended section 125 of Title I of the Elementary and Secondary Education Act to provide that no State shall receive in any fiscal year prior to October 1, 1978, an amount of funds under section 121 which is less than 100 percent of the amount which that State received in the prior fiscal year under section 121. Prior to this amendment, this "hold harmless" provision applied to each State agency rather than to the State as a whole. This amendment is reflected in § 116b.4(b) of this final regulation.

(b) The following reflect the modifications to the program required by Pub. L. 93-380: (1) *The Rate of Payment.* Except as provided in sections 124 and 125 of Title I (Reservation of Funds for Territories and Minimum Payments, respectively), the grant which an agency (other than the agency for Puerto Rico) is eligible to receive under this program is an amount equal to 40 per centum of the average per pupil expenditure in the State, or (1) in the case where the average per pupil expenditure in the

State is less than 80 per centum of the average per pupil expenditure in the United States, of 80 per centum of the average per pupil expenditure in the United States, or (2) in the case where the average per pupil expenditure in the State is more than 120 per centum of the average per pupil expenditure in the United States, of 120 per centum of the average per pupil expenditure in the United States, multiplied by the number of children in average daily attendance, as determined by the Commissioner, at schools for handicapped children operated or supported by the State agency. The grant which Puerto Rico is eligible to receive under this program is the amount arrived at by multiplying the number of children in Puerto Rico counted as provided in the preceding sentence by 40 per centum of (1) the average per pupil expenditure in Puerto Rico or (2) if the average per pupil expenditure is more than 120 per centum of the average per pupil expenditure in the United States, 120 per centum of the average per pupil expenditure in the United States. (2) *Adequacy of Program.* The State agency must now insure that each child counted in average daily attendance for purposes of determining the amount of a grant under this program, will be provided a program, commensurate with his or her special educational needs, during the fiscal year the federal funds are made available. (3) *Transfer.* Handicapped children who have left an educational program for handicapped children operated or supported by the State agency and are not participating in a program operated or supported by a local educational agency shall be counted in average daily attendance in determining the amount of a State agency's grant under this program if: (a) Each child counted continues to receive an appropriately designed special education program, and (1) the funds attributable to those children are transferred by the State agency to the local educational agency.

(c) The following reflect policy modifications of the program by the Bureau of Education for the Handicapped: (1) *Average Daily Attendance.* The Commissioner has determined, in accordance with the discretion granted him under section 121(c) of Title I, that average daily attendance for pupils counted under section 121 shall be 94 per centum of eligible enrolled children. The Notice of Proposed Rulemaking for part 116b stated that average daily attendance would be 94 per centum of the total membership enrollment of eligible handicapped children at a school or program. The change was made to reflect a determination by the Bureau of Education for the Handicapped that the average daily attendance of eligible handicapped

children is more closely reflected by the use of total membership enrollment. (2) *Service Costs.* As a result of a policy to assure a "free public education," costs for room and board may not be charged to the parents of a child placed in an institutional residential care facility for educational purposes. The proposed regulation stated that costs for medical care must be provided at no cost to parents if the child was placed in an institutional residential care facility by a State agency. That provision has been changed by dropping that requirement, and the new §116b.62(b) requires that parents not be charged for non-medical care. This change was made to coordinate this regulation with the regulatory requirements under part B of the Education of the Handicapped Act and section 504 of the Rehabilitation Act of 1973. The requirements of those regulations are further discussed below. (3) *Use of Funds for Services which the Applicant is Required to Provide.* Under the general Title I regulations (§116.40(b)), Title I funds, including funds under this part, may not be used for services which an applicant agency is required to provide by State law or pursuant to a formal determination under various Federal civil rights statutes (including section 504 of the Rehabilitation Act of 1973 relating to nondiscrimination respecting handicapped persons), or pursuant to a final order of a court. The Commissioner has determined that this restriction should not apply to the program under this part. Section 116b.2 has been amended to achieve this result. The change is more consistent with Congressional intent in creating this program, and should avoid disruption as States move toward full service for all handicapped children. The effect of the change will be that use of funds under this program for State-mandated education will not automatically constitute supplanting if no State or local funds are in fact displaced.

7. *Relationship to part B of the Education of the Handicapped Act, as amended by Pub. L. 94-142 (The Education of All Handicapped Children Act).* The program for handicapped children under section 121 of the ESEA is primarily for children whose education is provided by the State, including children in State residential facilities. Part B of the Education of the Handicapped Act, before October 1, 1977, provided funds for children in local school districts. Pub. L. 94-142, enacted on November 29, 1975, contains extensive amendments to part B, including provisions which are designed to assure that all handicapped children have available to them (within mandated timelines and age ranges) a free appropriate public education, to assure that the rights of

handicapped children and their parents are protected, to assist States and localities in providing education to handicapped children, and to assess and assure the effectiveness of efforts to educate those children. Most of the Pub. L. 94-142 amendments to part B became effective on October 1, 1977. The regulations published on August 23, 1977 (45 CFR Part 121a) were effective on that date. One issue clarified in this final regulation is whether funds available to a State under part B can be used in part to support educational programs for children in State operated or State supported schools. The former section 613(a)(9) of EHA (effective until October 1, 1977) required that a States' Annual Program Plan provide an assurance that part B funds would not be used for handicapped children eligible for assistance under section 121. The Office of Education had interpreted this provision to preclude use of part B funds for children who either were eligible to be counted, or who were actually counted under section 121. The new section 611(a)(5)(A)(iii), effective October 1, 1977, prohibits the Commissioner from counting handicapped children under part B who are counted under section 121 of ESEA, but does not preclude (assuming all other requirements of part B have been met) the use of part B funds for handicapped children either counted or eligible to be counted under section 121. That prohibition in section 611 of part B relates to the counting of, not the provision of services to, handicapped children. The prohibition is reflected in §116b.46 of this final regulation.

The new part 121a imposes requirements on a State educational agency regarding the treatment of handicapped children in a State receiving part B funds. These requirements benefit all handicapped children in the State, and are not limited to those children who have been counted or served under part B. The State educational agency is responsible for implementing those requirements regarding handicapped children eligible for section 121 benefits. These requirements include those activities relating to location, identification, and evaluation of handicapped children, development of an individualized education program, confidentiality of data, timelines relating to the provision of a free appropriate public education (and what services must be provided at no cost to parents under a free appropriate public education) development of a full education opportunity goal, placement, least restrictive environment, procedural safeguards, priorities in educating handicapped children, and parental participation. Due to the importance of the part 121a requirements for those involved in section 121 programs, the Office of Education

urges that close attention be paid to that regulation. Subpart H of the new part 116b cross-references those statutory requirements in part B of the Education of the Handicapped Act which affect the operation of programs under section 121.

8. *Relationship to section 504 of the Rehabilitation Act of 1973.* Final regulations governing section 504 of the Rehabilitation Act of 1973 were published on May 4, 1977 as part 84 of Title 45 of the Code of Federal Regulations (42 FR 22676-22702). Subpart D of part 84 relates to non-discrimination in the provision of education to handicapped children. The above-mentioned new part 121a (governing part B of the Education of the Handicapped Act, as amended), although more extensive than subpart D of part 84, closely parallels the latter regulation of section 504. To the extent a program or activity receives any Federal assistance (e.g. section 121 funds for State operated programs for handicapped children), the requirements of part 84 will apply to the operation of that program or activity.

9. *Citations of Legal Authority.* As required by section 431(a) of the General Education Provisions Act (20 U.S.C. 1232(a)), as amended by section 405 of Pub. L. 94-482 and section 503 of the Education Amendments of 1972, a citation of statutory or other legal authority for each section of the regulation has been placed in parentheses on the line following the text of the section.

10. *Comments and Responses.* Pursuant to section 503(c) of the Education Amendments of 1972, the Commissioner provided interested parties an opportunity for a public hearing on the proposed regulation, published April 13, 1976. The purpose of the hearing was to receive comments and suggestions on the published material. Additionally, an opportunity was provided to submit written comments and suggestions. Written comments were received from officials in State educational agencies, other State agencies, local school districts, private organizations, professional organizations, public interest groups, and individuals. The following is a summary of comments received and the responses setting forth either the changes which have been made in the regulation as a result of the comments, or the reason why no change is deemed necessary. Comments are arranged in order of the section of the regulation to which they pertain. Since the publication of the Notice of Proposed Rulemaking, this regulation has been extensively reorganized and, in many instances, the sections have been renumbered. References to section numbers in the following *Comments and Responses* are to the sections as numbered in this final regulation.

SUMMARY OF COMMENTS AND RESPONSES

1. SECTION 116b.3 DEFINITIONS

Comment. One commenter suggested that "eligible child" should be redefined to include uncounted children in agencies and various facilities where other children are counted. The commenter felt that those children, uncounted because, among other reasons, they may not have been enrolled in an educational program at the time of the average daily attendance count, were those who were most in need of section 121 funds.

Response. The definition of "eligible child" has been deleted. In using the term "eligible" to define only counted children, the definition was potentially misleading, causing some misunderstanding as to whether "eligible" referred to counted children only or also to those children "eligible to be counted." As to the commenter's concern that uncounted children were the children most in need, section 121 programs are intended to provide supplementary services for those children who are on the membership roll of a special education program. The statute contemplates services to children who have been counted. However, § 116b.55 provides that children who did not generate funds are eligible to participate on a space available basis if their participation does not adversely affect the program established for counted children. In addition, section 612(3) of Pub. L. 94-142 (effective October 1, 1977) requires a State to establish priorities for serving handicapped children in the following manner: As a first priority, to serve unserved handicapped children and, as a second priority, the most severely handicapped children within each disability category who are receiving inadequate services. The Office of Education notes that children in institutions eligible for funds under section 121 who have not been counted because they are not on the membership roll and are not in an educational program may be covered under the first priority, and the most severely handicapped receiving inadequate services may be covered under the second priority. Assuming all other requirements of part B of the Education of the Handicapped Act have been met, part B funds may be used to provide services to either counted or uncounted handicapped children for whom the State agency is directly responsible for providing a free public education.

Comment. A commenter suggested that the term "State-supported school" be defined to include a minimum percentage rate of State financial support to establish the qualifications of specific schools. The commenter felt that the absence of these criteria made it difficult to determine the eligibility of alleged State-supported schools.

Response. The comment has not been adopted. The percentage of State financial support is irrelevant, as only as the State agency which is directly responsible for providing free public education has entered into a contract or other arrangement with the State supported school. A comment has been added following the definition, which discusses the qualifications of an eligible State-supported school, and which emphasizes the requirement that the State agency be legally responsible for the education of the child.

Comment. One commenter suggested that "orthopedically impaired" replace "crippled" and that "specific learning disabilities" be added as a category to the definition of "handicapped children," in order that the definition include the definition of "handicapped children" contained in part B of the Education of the Handicapped Act.

Response. No change has been made in the definition. The definition is required by statute. The new definition of "handicapped children" and of the individual handicapping conditions have been published as part of the final regulation (the new part 121a) governing part B of the Education of the Handicapped Act, as amended (42 FR 22676-22702). The Commissioner will consider adopting those definitions (to include orthopedically impaired and learning disabilities as separate categories) at a future date for this section 121 program. The Commissioner has adopted the definitions of "special education" and "related services" from the new part 121a and has referenced those definitions in § 116b.3 of this part.

2. SECTION 116b.4 ANNUAL PROGRAM PLAN

Comment. One commenter felt that the State educational agency should submit only one plan which would be submitted as part of the Education of the Handicapped Act plan. The commenter felt that this would lessen the paperwork burden of the State.

Response. No change has been made in the regulation. Section 142 of Title I of the Elementary and Secondary Education Act and § 116b.3 of the General Education Provisions Act (45 CFR part 116) require that section 121 plans be submitted with the general Title I plan.

3. SECTION 116b.12 STATE EDUCATIONAL AGENCY AS FISCAL AGENT

Comment. One commenter suggested that a State educational agency (or a State agency) be able to administer funds directly to an eligible local educational agency under this part. The commenter felt that this would relieve State agencies, particularly in sparsely populated States, of additional bookkeeping and paperwork.

Response. The comment has been adopted. Section 116b.12 states that

the State educational agency may act as the fiscal agent of the State agency in disbursing funds under this part, including transfers of funds to local educational agencies

SECTION 116b.13 OTHER STATE EDUCATIONAL AGENCY RESPONSIBILITIES

Comment. A commenter felt that the regulation should allow the State educational agency to develop services for children in other State agencies if a State agency's application does not account for all handicapped children in the State agency who are eligible under this part.

Response. No change has been made in the regulation. Nothing in the regulation prohibits a State educational agency from developing services for a handicapped child. In a situation where the State educational agency is jointly responsible for the education of handicapped children, that agency could be treated as any other eligible State agency in applying for funds under this part. In a State receiving funds under part B of the Education of the Handicapped Act, the State educational agency is responsible for ensuring that all education programs in the State are under the supervision of the State educational agency, and that a free appropriate public education will be provided to all handicapped children in the State (within the State's ages and timeline). (The requirements of part B are referenced in part H of this part.) In addition, if an application by a State agency under this part does not account for all handicapped children in the agency, unaccounted children in the State agency at the time the funds are allocated may be served as stated in § 116b.13 of this part.

SECTION 116b.21 PROJECT APPLICATION REQUIREMENTS

Comment. A commenter suggested that the project application include a statement concerning the State agency's responsibility to assist the State educational agency in meeting the requirements of the annual program plan. The commenter felt that this would expedite the delivery of the annual program plan to the Commissioner and would make it less difficult for the State educational agency to obtain required information from the agency.

Response. A change has been made in the regulation by adding the new § 116b.21(b)(12) requiring that the project application contain a description of the procedures to be used in developing and implementing the individualized education program which must be provided for each handicapped child under part B of the Education of the Handicapped Act. A new subpart H has been added which references the additional requirements of the Education of the Handicapped Act, which would include the requirement that a child be educated in the least restrictive setting.

uation of programs and projects assisted under this part. In addition, the new § 116b.30 requires that the project application of the local educational agency include any information the State educational agency requires to perform its duties under this part.

Comment. One commenter emphasized the need for comprehensive in-service education of all individuals involved with a handicapped child. The commenter felt that § 116b.21(b)(8), requiring a description in the project application of any proposed training for the school staff and parents of handicapped children, was inadequate, as it did not require any proposed training.

Response. The comment has not been adopted. The Office of Education considers the training of personnel essential to the success of programs and projects assisted under this part and encourages the use of funds for that training. However, payment of Title I funds for in-service training is dealt with in §§ 116.34 and 116.36, of the General Provisions governing Title I (part 116).

Comment. One commenter suggested that the project application reflect the responsibility of the applicant to provide an appropriately designed individualized education program for each child receiving services under this part. Another commenter suggested that the project application should contain assurances that the child being served under this part would be educated in the least restrictive alternative. Both commenters felt that the suggested changes should be made to comply with the requirements of part B of the Education of the Handicapped Act, as amended by Pub. L. 94-142.

Response. A change has been made in the regulation by adding § 116b.21(b)(12) requiring that the application contain a description of the procedures to be used in developing and implementing the individualized education program which must be provided for each handicapped child under part B of the Education of the Handicapped Act. A new subpart H has been added which references the additional requirements of the Education of the Handicapped Act, which would include the requirement that a child be educated in the least restrictive setting.

SECTION 116b.22 PARENTAL PARTICIPATION IN THE DEVELOPMENT OF THE PROJECT APPLICATION

Comment. One commenter suggested that parents should have sufficient notice of the opportunity to participate in the development of the project application, and that newspaper publication of that notice would most effectively reach the general public.

Response. A change has been made in the regulation by adding a new

§ 116b.21(b)(13) which requires that the project application contain a description of the procedures used to give parents of the handicapped children an opportunity to participate in the development of the project application. However, no change has been made in § 116b.22 to require newspaper publication of the opportunity to participate in the development of the project application. Programs and projects under this part are very diverse and vary greatly within a State in terms of the extent of geographic isolation (which may affect parent availability) and the numbers of handicapped children in a program or project. Because of this diversity, the Office of Education believes that the State agency is best able to determine what methods of notice are appropriate and what best constitutes an opportunity to participate in the development of any particular project application.

SECTION 116b.25 REPORTING BY STATE AGENCY OF CHILDREN TRANSFERRING TO A LOCAL EDUCATIONAL AGENCY PROGRAM

Comment. One commenter felt that the State educational agency should be able to set the timelines for submission of the report of children transferring to a local educational agency and submission of the project application. The commenter felt that this change would provide the needed administrative flexibility for the State educational agency.

Response. The required reporting date under § 116b.25 of June 30 has been dropped, and the new § 116b.25(b) requires the State educational agency to prescribe the manner of submitting the report. The proposed § 116b.21 (relating to submission of the project application) did not contain any required date for submission of the project application.

Comment. One commenter felt that the proposed § 116b.25, in requiring reporting the child's name, might be inconsistent with State laws. Another commenter feared that the provision would violate the Family Educational Rights and Privacy Act (governing the confidentiality of personally identifiable data in student records; 20 U.S.C. 1232g) and the confidentiality regulations under part B of the Education of the Handicapped Act (45 CFR 121a.560-121a.578).

Response. A change has been made in the regulation to permit an alternate method of identifying the child as well as identifying each child's handicapping condition. The change has been made to accommodate State laws. A report under this section which does include the name of the child would violate neither the part B confidentiality regulations nor the Family Education Rights and Privacy Act, although States are encouraged

not to collect data in personally identifiable form.

8. SECTION 116b.31 TRANSFER OF FUNDS TO LOCAL EDUCATIONAL AGENCIES

Comment. One commenter felt that, upon a child's leaving a State agency to enroll in a local educational agency, the funds should not be transferred to the local educational agency but should remain in the State agency for use by other handicapped children. Another commenter stated that the statute does not mandate the transfer of funds but permits the transfer if the two statutory conditions are met.

Response. The section has been revised so that the transfer of funds is not mandatory in certain situations. In addition a comment has been added, following the section, which discusses the situations in which the transfer of funds is either mandatory or permissive. Examples have been provided as well as suggested criteria that the State agency could take into account in determining whether to transfer funds to the local educational agency.

Comment. One commenter, noting that a child's placement can change at any time during the school year, stated that children enrolling in a local educational agency after they were counted October 1 in a State agency program did not become part of the local educational agency's average daily attendance count for many months after their transfer. The commenter felt that if those children were not qualified to receive services that year on a space available basis (§ 116b.55), those children were unfairly denied any services under this part during the year of their transfer.

Response. The comment added following § 116b.31 indicates that a State agency may transfer funds generated by a child in a State agency count at the time of the child's transfer to the local educational agency.

Comment. One commenter felt that the section should indicate that a State agency has the discretion to transfer an amount of funds greater than or equal to the amount of funds that the handicapped child generated.

Response. No change has been made in the regulation to permit a transfer of funds in an amount greater than or less than the amount of funds that the handicapped child generated. The statute only authorizes a local educational agency to receive an amount of funds equal to the amount the child generated. Section 116b.41(a)(3)(iv) states that a handicapped child in a local educational agency may be counted in average daily attendance under this Part if, among other conditions, the State agency transfers to the local educational agency an amount equal to the sums received by the State agency which are attributable to that handicapped child. This is

a statutory provision. Section 116b.50(b) states that the entire amount of funds generated by a child need not be spent on that child as long as some of the funds are used to meet his or her individual special education needs. Having received the entire amount of funds generated by the handicapped child, the local educational agency has the discretion to use all or some of that amount on the child. The remaining funds generated by the child, if any, must be used according to § 116b.50(b).

Comment. One commenter felt that any mandatory transfer of funds to the local educational agency was an undesirable drain of funds from the State agency. The commenter felt that funds generated by a child currently in a local educational agency should be retained by the State agency for use on other handicapped children in the State agency who were either counted or uncounted under this part.

Response. A comment has been added following § 116b.31 which discusses under which circumstances a State agency may retain funds attributable to a child currently in a local educational agency for use for other handicapped children in that State agency. Section 116b.55 discusses the participation of children who were not counted under this Part.

Comment. One commenter felt that funds attributable to a child eligible under § 116b.41 (a child transferring to a local educational agency program or project), and who subsequently returns to the State agency, should not continue to be transferred to the local educational agency.

Response. Section 116b.33(b) states that the State educational agency may require the local educational agency to either retain funds generated by a child who has left the local educational agency and use those funds for other handicapped children enrolled in that local educational agency, or to return all or a portion of those funds to the State agency in which that child was formerly enrolled. Handicapped children who have left the local educational agency and who have returned to the State agency may not, of course, continue to be counted in the local educational agency average daily attendance count and are eligible to be counted in the State agency average daily attendance count.

9. SECTION 116b.41 ELIGIBILITY OF CHILDREN TO BE COUNTED

Comment. One commenter suggested that a child eligible under § 116b.41(a)(3) should not be counted by the local educational agency for longer than two years. The commenter, noting that the funds under this part are for State operated programs for handicapped children, felt that this restriction would permit

more funds under this part to flow to and remain in the State agency itself.

Response. No change has been made in the regulation. A child may be counted by the local educational agency as long as the child is eligible, that is, meets the requirements of § 116b.41(a)(3). The statute sets no limitation on the length of time the child may be counted by the local educational agency.

10. SECTION 116b.43 AVERAGE DAILY ATTENDANCE COMPUTATION

Comment. One commenter felt that the requirement that average daily attendance be 94 percent of the total membership enrollment was undesirable, as average daily attendance in State operated programs is closer to 100 percent of enrollment. The commenter felt that the use of the 94 percent figure created inaccurate deviations in reporting by speaking of "whole" children versus "partial" children.

Response. The comment has been adopted by defining average daily attendance to mean the total membership enrollment of handicapped children.

11. SECTION 116b.44 DATES FOR COUNTING AND REPORTING AVERAGE DAILY ATTENDANCE

Comment. One commenter felt that the October 1 date should be replaced by a date later in the school year, as October 1 generally reflected a time of low enrollment of handicapped children in a State supported program and many children had not been referred to the State agency by that date.

Response. The comment has not been adopted. The date for counting by the State agency and local educational agency will remain as October 1. The Office of Education feels that date for counting should be consistent with the counting date of handicapped children under part B of the Education of the Handicapped Act.

Comment. One commenter felt that the State educational agency should be allowed to establish the date for the counting of handicapped children under this part. The commenter felt that this would give the State greater flexibility and may permit a more accurate count.

Response. The comment has not been adopted. Although it may be true that greater flexibility in determining the date to count may permit a more accurate count in a given situation, the Office of Education feels that the October 1 date will allow for consistency in the counting of handicapped children under this program and part B of the Education of the Handicapped Act. In addition, the timely submission of average daily attendance data to the State educational

agency not "local" in enabling the State educational agency to submit the average daily attendance data to the Commissioner by November 15, as required by § 116b.44(b).

Comment. One commenter felt that the report under § 116b.25(a)(1) (reporting of children transferring to a local educational agency) and the report under § 116b.44(a) (the report of average daily attendance) overlapped.

Response. No change has been made in response to this comment. As the mandatory reporting date of June 30 under § 116b.25 has been dropped, a State agency could determine that the information required under both sections could be reported at the same time. The Office of Education expects that the State educational agency may determine that the information required under § 116b.25 should be reported at a date later than October 1.

13. SECTION 116b.50 THE EDUCATIONAL PROGRAM

Comment. One commenter wanted this section to state that a child need not receive all the funds if a child generated as long as the child received some benefit from the funds.

Response. A change has been made in response to the comment by adding § 116b.50(b), which states that the amount of funds generated by a child under this part need not be spent on that child as long as some of the funds are used to meet his or her individual special education needs.

The remaining funds, if any, generated by that child may be spent on other handicapped children counted under § 116b.41 in the school where the child is located. Participation of uncounted children is discussed in § 116b.55.

Comment. One commenter wanted clarification on what extent a program could be funded with funds under this part.

Response. A change has been made in the regulation by adding § 116b.50(c), which states that a program may be supported in whole or in part with funds under this part, but that a State agency shall not use funds under this part to pay for its educational program for handicapped children.

14. SECTION 116b.51 STATE STANDARDS

Comment. One commenter suggested that in a situation where a handicapped child withdraws from a program created under this part because the program does not meet State standards, the State agency, through the State educational agency, should notify the Commissioner of the local educational agency before the child is withdrawn. The commenter felt that the local educational agency should be known to the State agency for the child would be withdrawn.

Response. The comment has not been adopted. The provision in the proposed rule requiring that the State agency notify the Commissioner of a handicapped child's withdrawal has been deleted. Reporting the withdrawal of an individual handicapped child from a program not meeting State standards would be an unduly burdensome reporting requirement for both the State agency and the Commissioner. However, the Office of Education recognizes the need to determine the location of any handicapped child withdrawn from a program to prevent that child becoming lost in the educational system. The new § 116b.51 requires the State educational agency have standards which insure that each handicapped child counted under this part receives an appropriately designed education. In addition, as referenced in § 116b.73, part B of the Education of the Handicapped Act requires that any activities conducted with funds under this part to assist the education of handicapped children must meet the standards of the State educational agency. Enrollment of a child counted under this part in an inadequate program violates § 116b.51. In a State receiving part B funds, the Education of the Handicapped Act protects those handicapped children whether counted or uncounted under this part.

Comment. One commenter felt that the word "standards" was confusing in that it was too broad a term and may imply to the reader that all the education codes, regulations, and policies of the State educational agency must be met. The commenter felt that the word should be deleted or defined in § 116b.3.

Response. The comment has not been adopted. The Office of Education feels that "standards" is not too broad a term and refers to a coherent, recognizable set of educational requirements established by each State educational agency. In addition to the requirements of § 116b.51, a new § 116b.73 has been added to reflect the requirement of part B of the Education of the Handicapped Act that any activity to assist the education of handicapped children under part 116b must meet the educational standards of the State educational agency.

14. SECTION 116b.52 MAINTENANCE OF DIRECTION AND CONTROL

Comment. One commenter felt it was impractical for an agency to maintain complete control over a private program operated under contract or other agreement with the agency.

Response. The regulation has been changed by deleting the adjective "complete." The intent of the section is to require administrative and supervisory control and direction over the program. The use of the word "com-

plete" may have been misleading. The section's intent was to prohibit contracting out all services to children and to require, as a minimum, participation of the State agency or local educational agency through the administration and supervision of the services provided.

Comment. One commenter stated that his State law does not permit one department to exercise supervision over a program in another department. The commenter suggested dropping the requirement of maintaining supervisory direction and control and to require only the maintenance of administrative direction and control.

Response. No change has been made in the regulation. As the particular State agency or local educational agency involved is charged with providing those children receiving funds under this part with an appropriately designed education program, the Office of Education feels that retaining the requirement of supervisory as well as administrative control is a valid one. The State educational agency must meet a similar requirement with respect to all education programs for handicapped children, including those administered by other State agencies.

15. SECTION 116b.53 DISSEMINATION, SECTION 116b.54 CONSTRUCTION AND EQUIPMENT

Comment. One commenter felt that the "promising special educational practices" referred to in § 116b.53 and the use of the word "equipment" in § 116b.54 should be clarified to indicate the terms may include the use of educational materials, media, and technology.

Response. No change has been made in the regulation. The Office of Education does not feel that it is practical to include a complete list of activities that may be included under these two sections. In not changing the regulation, the Office of Education in no way means to exclude educational materials, media, and technology from either of these two sections. The Office of Education encourages the development of educational materials, media, and technology in the spheres of educational practices and equipment development.

16. SECTION 116b.60 ALLOWABLE COSTS

Comment. Two commenters suggested that funds provided to a State agency under this part should be able to be used to pay for administrative costs. Another commenter felt that administrative costs should not be limited to one percent of the funds received by that State agency.

Response. No change has been made in the regulation. Section 116b.60 indicates that administrative costs of the State educational agency are permissible, subject to section 143(b) of the

Act. The limitation of one percent on that agency's administrative costs is statutorily set, and applies to the administration of all programs under Title I. (See the discussion in the preamble to the Migrant Program regulations, 42 FR 36077-36078, published July 13, 1977.) However, there is no statutory restriction on the use of funds received by a State agency (other than the State educational agency) for administrative costs. Therefore, a State agency may use funds under this part to pay for reasonable and necessary costs of administering those funds, subject to 45 CFR 100a.81 (Allowable costs) and 45 CFR Part 100c (Indirect cost rates).

17. SECTION 115b.61 SPECIAL EDUCATION AND RELATED SERVICES

Comment. One commenter wanted the section to authorize occupational therapy as a related service.

Response. No change has been made in the regulation to specifically mention occupational therapy. The proposed rule contained a non-exhaustive list of permissible related services. This final rule deleted that list and adopted the definition of related services from part 121a. That definition includes occupational therapy as a related service.

Comment. One commenter, noting that some children are placed in foster homes in a school district by a mental health agency, feared that the school district may not be able to meet the mental health needs of those students (necessary intensive counseling and therapy) in addition to providing educational services.

Response. No change has been made in the regulation to specifically mention counseling and therapy. However, the definition of related services, adopted for this part from part 121a, includes psychological services and counseling services as qualified "related services."

Comment. One commenter felt that the list of permissible related services in the proposed regulation was worded so broadly that it authorized the establishment of duplicate and competing health care facilities by the school system for treatment of handicapped children in lieu of the use of existing health department programs and facilities.

Response. No change has been made in the regulation. Neither the proposed rule nor this final regulation is intended to authorize the use of funds under this part to establish separate health care facilities to deliver related services to handicapped children.

Comment. One commenter felt that the list of related services in the proposed regulation should specifically include educational media, instructional materials, and media technology services as these services are of great im-

portance in the advancement of special education.

Response. The definition of "related services" in § 121a.13, adopted for purposes of this part, does not specifically list media, materials, and technology as separate categories of services. However, it is expected and permissible that funds under this part may be used for the services suggested by the commenter to the extent they assist in the provision of special education and related services to children served under this part.

18. SECTION 115b.62 TUITION AND SERVICES

Comment. Many commenters objected to the provision proposing that parents not be charged for room, board, and medical expenses when the child is placed in a residential institutional care facility by the State agency. The commenters objected to the provision for the following reasons: (1) Many States have provisions for charging parents for room and board on a sliding scale basis--according to ability to pay. Some commenters felt that, since their State received more money from these charges than from section 121, it would force the State to discontinue participation in this Title I program. Another commenter felt that the sliding scale charges did not overburden the parents, as the charges were geared to the "ability to pay". (2) It was felt that in most circumstances, medical expenses are not related to enabling the child to benefit from an education, and parents of handicapped children should continue to be responsible for their child's medical care just as parents of non-handicapped children are responsible. (3) It was also stated that there is a distinction between those children placed in residential care facilities for educational purposes and those placed for other noneducational purposes (i.e., residential), and that the majority of section 121 children were placed for noneducational purposes. (4) Another reason given in opposing this provision was that other programs (i.e., Insurance, Federal social service programs) which provide reimbursement for services such as room and board may require, as a condition of funding, that parents be charged fees on an ability to pay basis in order to be eligible for their program's funding. Generally, other Federal funding programs provide payment for educational services.

Response. The regulation has been changed to read that parents of handicapped children served under this part shall not be charged for special education or related services provided for those children. (Including the cost of service such as room and board and non-medical care which are provided in an institutional residential care facility in which the child is placed for

educational purposes.) The prohibition that medical costs cannot be charged to parents has been dropped in response to comments received in an effort to coordinate the requirements of this part with the statutory and regulatory requirements of part 121 of the Education of the Handicapped Act, as amended by Pub. L. 94-142 and section 504 of the Rehabilitation Act of 1973. Citations to the latter regulations are contained elsewhere in the preamble. The prohibition that parents not be charged for the costs of room and board has been retained. Again, this has been done to comply with the requirements of part 121, section 504. The Office of Education has determined that the "free" of "free public education" includes the requirement that room and board not be charged to parents when the handicapped child is placed in a residential care facility for educational purposes.

19. SUBPART H. REQUIREMENTS UNDER PART B OF THE EDUCATION OF ALL HANDICAPPED ACT

This subpart has been added to make reference to the requirements of part B as they apply to programs and projects assisted under this part. The new § 115b.40 has been added to reflect the requirement of part B that children counted under section 121 may not be counted under part B. After consideration of all comments, Title 45 of the Code of Federal Regulations is amended by adding a new part 115b, to read as set forth below.

NOTE: The Department of Health, Education, and Welfare has determined that this document does not contain a major policy requiring promulgation of an Federal Impact Statement under Executive Order 11221 and 11625, Circular 1107.

(Catalogue of Federal Reg. as Issued, Number 1547, State Govt. and Local Govt. for Handicapped Children)

Dated: November 4, 1977.

Approved: April 4, 1978.

URNEST L. BOYER,
U.S. Commissioner of Education

JOSEPH A. CALIFANO, Jr.,
Secretary of Health,
Education, and Welfare

Subpart A--General

Sec.
115b.1 Section 115b.1
115b.2 Section 115b.2
115b.3 Section 115b.3

Subpart B--State Educational Agency
Participation

115b.4 Subpart B of annual report
115b.5 Subpart B of annual report
115b.6 Subpart B of annual report
115b.7 Subpart B of annual report
115b.8 Subpart B of annual report
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115b.13 Subpart B of annual report

See
116b.14 Reallocation of funds between State agencies.

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- 116b.20 State agency eligibility
- 116b.21 Project application requirements
- 116b.22 Parental participation in the development of the project application
- 116b.23 State agency responsibilities
- 116b.24 Children who may be served
- 116b.25 Reporting by State agency of children transferring to a local educational agency program

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- 116b.30 Local educational agency project application
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- 116b.32 Local educational agency use of funds
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- 116b.34 Funds not used by a local educational agency

Subpart E—Amount of Grants and Counting Average Daily Attendance

- 116b.40 Amount of grants
- 116b.41 Eligibility of children to be counted
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- 116b.44 Date for counting and reporting average daily attendance
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Subpart F—Program Requirements

- 116b.50 The educational program
- 116b.51 State standards
- 116b.52 Maintenance of direction and control
- 116b.53 Dissemination
- 116b.54 Construction and development
- 116b.55 Participation of children who were not counted
- 116b.56 Participation in programs under Part 116a

Subpart G—Allowable Costs

- 116b.60 General
- 116b.61 Special education and related services
- 116b.62 Education and services
- 116b.63 Transportation costs

Subpart H—Requirements Under Part B of the Education of the Handicapped Act

- 116b.70 Part B requirements
- 116b.71 Supervision of programs for handicapped children
- 116b.72 Use of funds for handicapped children
- 116b.73 State educational agency standards
- 116b.74 Withholding payments for non compliance

Priority: Sec. 21 of Pub. L. 89-10, as amended, 88 Stat. 499-492 (20 U.S.C. 241c-1), and otherwise noted.

Subpart A—General

§ 116b.1 Scope.

This part applies to programs and projects assisted under section 121 of Title I of the Elementary and Secondary Education Act of 1965, as amended.

(20 U.S.C. 241c-1.)

§ 116b.2 Other applicable regulations.

Programs and projects assisted under this Part are also subject to the following regulations:

(a) Part 116 of this chapter (general requirements relating to Title I of the Act, including § 116.5 *Approval by State educational agency of applications from applicant agencies*, § 116.7 *Reports by State educational agencies*, § 116.31 *Cooperative projects*, and § 116.40 *Title I funds supplementary to State and local funds*), except that § 116.40(b) (Use of funds for services which the applicant is required to provide) does not apply; and

(b) Parts 100, 100b, and 100c of this chapter (relating to fiscal, administrative, property management, and other matters).

(20 U.S.C. 241c-1.)

§ 116b.3 Definitions.

As used in this part (in addition to the definitions set forth in Parts 100 and 116 of this chapter):

"Handicapped children" includes those children who are mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, or other health impaired, who because of those impairments need special education.

"Related services" is used in this Part as defined in § 121a.13 of this chapter.

"Special education" is used in this Part as defined in § 121a.14 of this chapter.

"State agency" means an institution or agency of the State which has direct responsibility established under State law for providing free public education for handicapped children.

"State-operated school" means a school or program which is administered directly by a State agency.

"State-supported school" means a school or program operated under contract or other arrangement with a State agency.

(20 U.S.C. 241c-1; 20 U.S.C. 1401 (16), (17).)

Comment. A State agency may use funds under this part only to serve those handicapped children for whom the agency is directly responsible for providing free public education. The State agency may serve those handicapped children in State-operated or in State-supported schools. Although typically the State agency contributes a significant portion of the cost of providing education to handicapped children in a State-supported school, the extent of that

contribution is irrelevant as long as the State agency is legally responsible for providing education to the handicapped children in that State-supported school.

Subpart B—State Educational Agency Participation

§ 116b.10 Submission of annual program plan.

(a) A State educational agency shall submit a general application and an annual program plan to the Commissioner as provided in § 116.3 of this chapter.

(b)(1) The annual program plan must include a description of each project funded under this part, including each project conducted by a local educational agency.

(2) The description of a project must include: (i) The project number, if any, (ii) a brief narrative description of the project, (iii) the project location, (iv) the number of children to be served in the project, (v) the number of personnel to be hired for the project, and (vi) the amount of funds provided under this part to be spent on the project.

(3) Each project description must be reported under the heading of the State agency from which the project receives its funds. If a project receives funds from more than one State agency, that project may be listed under a separate heading.

(20 U.S.C. 1232(c)(2), 241c-1, 241f.)

§ 116b.11 Submission of financial status and performance reports.

(a) Each State educational agency shall submit a final Financial Status Report and a Performance Report annually to the Commissioner, as required in Subparts P and Q of Part 100b of this chapter.

(b) If funds are carried over from the previous fiscal year, under § 100b.55 of this chapter, the State educational agency shall submit a separate Financial Status Report and a separate Performance Report with respect to those funds.

(20 U.S.C. 241c-1.)

§ 116b.12 State educational agency as fiscal agent.

The State educational agency may act as the fiscal agent of the State agency in disbursing funds under this part, including transfers of funds to local educational agencies under Subpart D of this part.

(20 U.S.C. 241c-1.)

§ 116b.13 Other State educational agency responsibilities.

In addition to those requirements in Part 116 of this chapter, each State educational agency shall:

(a) Determine whether each State agency is eligible for a grant under this part;

(b) Assist State agencies and local educational agencies in the development, implementation, evaluation, and supervision of projects under this part;

(c) Assist State agencies and local educational agencies in determining and reporting average daily attendance of handicapped children under Subpart E of this part;

(d) Insure that all handicapped children served with funds under this part are receiving special education in a program which meets the State educational agency standards under § 116b.51;

(e) Insure that the information reported under § 116b.44(b) is accurate; and

(f) Develop and implement procedures to monitor all projects.

(20 U.S.C. 241c-1)

§ 116b.14 Reallocation of funds between State agencies.

The State educational agency shall reallocate funds (subject to the prior written approval of the Commissioner) between State agencies if a handicapped child who generated funds in one participating State agency is transferred to another participating State agency.

(20 U.S.C. 241c-1)

Subpart C—State Agency Participation

§ 116b.20 State agency eligibility.

Each State agency is eligible to receive a grant under this Part for each fiscal year.

(20 U.S.C. 241c-1)

§ 116b.21 Project application requirements.

(a) In order to receive a grant under this part, a State agency must submit a project application to the State educational agency.

(b) A project application must:

(1) Meet the requirements in Subpart D of Part 116 of this chapter;

(2) Set forth the number of handicapped children to be served with funds under this part;

(3) Describe the nature and purpose of the proposed project and include measurable child-centered objectives;

(4) Identify each school in which the handicapped children are enrolled, the number of those children, and their ages and handicapping conditions;

(5) Describe the educational services currently being provided for handicapped children with State and local funds in each of these schools;

(6) Provide an assessment and description of the needs of those children for special education and related services based on the best available data, including data on their past educational performance;

(7) Describe each educational service to be provided with funds under this part to meet the needs assessed and

described under paragraph (b)(6) of this section;

(8) Describe any proposed training for the school staff and for the parents of those children;

(9) Describe the procedures which will be used to evaluate the effectiveness of the project;

(10) Describe the nature and extent of any proposed coordination with other Federal, State, or local agencies, or related programs, in the development, operation, and administration of the program or project assisted under this Part;

(11) Provide for educational services and training for parents of those children, to the extent that parental understanding of the services being provided to their children could contribute to the effectiveness of the program or project;

(12) Describe the procedures to be used in developing and implementing the individualized education program which must be provided for each handicapped child under Part 121a of this chapter;

(13) Describe the procedures which were used to give parents of these children an opportunity to participate in the development of the project application; and

(14) Describe the methods of dissemination of project information.

(20 U.S.C. 241c-1)

§ 116b.22 Parental participation in the development of the project application.

Each State agency shall provide parents of the children to be served with funds under this part with an opportunity to participate in the development of its project application.

(20 U.S.C. 241c-1; 1231d.)

§ 116b.23 State agency responsibilities.

Each State agency shall:

(a) Coordinate and consult with its State educational agency in the development, implementation, supervision, and evaluation of programs and projects assisted under this part; and

(b) Provide reports to the State educational agency as necessary to enable the State educational agency to fulfill its administrative and fiscal responsibilities under this part and Part 116 of this chapter.

(20 U.S.C. 241c-1)

§ 116b.24 Children who may be served.

A State agency may use funds under this part only for programs and projects (including the acquisition of equipment and, where necessary, the construction of school facilities) which are designed to meet the special educational needs of handicapped children for whom the State agency is directly responsible for providing free public education

(20 U.S.C. 241c-1)

§ 116b.25 Reporting by State agency of children transferring to a local educational agency program.

(a) Each State agency which receives funds under this Part shall submit an annual report to the State educational agency of all handicapped children who:

(1) Were counted in average daily attendance under section 121 of the Act during the school year 1971-1972 or in a subsequent year; and

(2) Will leave or have left the special education program operated or supported by that agency in order to participate in a special education program operated or supported by a local educational agency.

(b) The State educational agency shall prescribe the manner of submitting the report.

(c) Each State agency shall insure that the report includes:

(1) The name of each child (or other information used by the State to identify the child);

(2) A description of each child's handicapping condition (or other information used by the State to identify the handicapping condition); and

(3) The name of the local educational agency in which the child will enroll.

(20 U.S.C. 241c-1)

Subpart D—Local Educational Agency Participation

§ 116b.30 Local educational agency project application.

(a) In order to receive funds under this part, a local educational agency must submit a project application to the State educational agency.

(b) The application must meet the requirements in § 116b.21 and include any other information the State educational agency requires to perform its duties under this part.

(c) The State educational agency may reduce the amount of information submitted under § 116b.21 if the local educational agency serves five or fewer handicapped children under this part.

(20 U.S.C. 241c-1)

§ 116b.31 Transfer of funds to local educational agencies.

A local educational agency may receive funds under this Part to serve a handicapped child if:

(a) The handicapped child left an educational program for handicapped children operated or supported by a State agency in order to participate in a program operated or supported by the local educational agency;

(b) The child continues to receive an appropriately designed educational program; and

(c) The State agency transfers the funds generated by the child under this part to the local educational agency.

(20 U.S.C. 241c-1.)

Comment. 1 Under the statute, it is the responsibility of the State agency to transfer funds to a local educational agency. However, under § 116b.32, the State educational agency may transfer the funds directly to the local educational agency as the final agent of the State agency.

2 The local educational agency receives funds based on the number of transfer children that it serves. Subpart E provides the rules for counting these children. The local educational agency submits its count to the State educational agency.

3 It should be noted that funds generated by the count of a child in one year are not available until the following year. Because of this one year delay in the availability of funds, the determination of which agency (local or State) should receive the funds can become a complex problem. The following clarifications are provided to assist in determining whether or not the transfer of funds to a local educational agency is mandatory.

(a) The local educational agency may receive all funds generated by a child whom the local educational agency counted in the previous year, subject to the compliance by the local educational agency with the requirements of this Part.

(b) The State agency may, but is not required to, transfer to the local educational agency funds generated by a child whom the State agency counted in the previous year. For example, the transfer of funds is optional in the following situations: (1) The State agency counts a child on October 1, and the child enrolls in the local educational agency following that count but during the same school year. The State agency may decide to transfer the funds to the local educational agency when those funds become available (the following year) or may decide to retain those funds for use on other counted handicapped children in that State agency. (If the local educational agency then counts the child the following year, funds must be transferred.) (2) The State agency counts a child on October 1 of one school year and the child enrolls in the local educational agency the following school year (the year the funds become available). The State agency may decide to transfer those funds to the local educational agency at the time of the child's enrollment in the local educational agency or may decide to retain those funds for use for other counted handicapped children in that State agency. In examples (1) and (2), uncounted handicapped children may be served on a space available basis (§ 116b.55).

4 Although the transfer of funds to the local educational agency is optional under the examples in paragraph (b) above, the State agency may wish to take into account the following in exercising its option. When or not the State agency continues to maintain approved projects, the number of children who have left the State agency and who are currently enrolled in a local educational agency, and the number of children approved projects in the State agency.

5 If a child has left the local educational agency, § 116b.33 governs the use of the funds.

§ 116b.32 Local educational agency use of funds.

(a) A local educational agency which receives funds under this Part shall use those funds to supplement the appropriately designed education for handicapped children provided by that agency.

(b)(1) The local educational agency may enter into a contract or other arrangement with other agencies and schools, intermediate school districts, or the State educational agency, subject to Subpart I of Part 100b of this chapter, for carrying out activities under this subpart.

(2) The local educational agency shall administer or supervise those activities.

(20 U.S.C. 241c-1(d).)

§ 116b.33 Funds attributable to children who leave the local educational agency.

(a) The State agency shall not transfer funds to a local educational agency if all handicapped children counted under this part cease to be enrolled in that local educational agency.

(b) If a handicapped child counted under this part ceases to be enrolled in the local educational agency, that local educational agency shall notify the State educational agency, and the State educational agency shall require the local educational agency to either:

(1) Retain funds generated by that child under this Part to be used for the other handicapped children enrolled in that local educational agency; or

(2) Return all or a portion of those funds to a State agency in which that child was formerly enrolled.

(20 U.S.C. 241c-1(d).)

§ 116b.34 Funds not used by a local educational agency.

If a local educational agency is unable or unwilling to use all or part of the funds available to it under this part, the State educational agency shall transfer the funds to the State agency in which the handicapped children counted under this part were formerly enrolled.

(20 U.S.C. 241-1(c) and (d).)

Subpart E—Amount of Grants and Counting Average Daily Attendance

§ 116b.40 Amount of grants.

(a) *Formula for determining the amount of grant.* A State agency is eligible to receive an amount of funds as computed under the formula in section 121(b) of the Act.

(20 U.S.C. 241c-1(b).)

(b) *Minimum payment.* In any fiscal year prior to October 1, 1978, no State shall receive an amount of funds under this part which is less than 100 percent of the amount which that

State received in the prior fiscal year under section 121 of the Act.

(20 U.S.C. 241c-5.)

§ 116b.41 Eligibility of children to be counted.

(a) A handicapped child may be counted in average daily attendance for the purpose of computing a grant under section 121(b) of the Act, if:

(1) The child is on the membership roll of a State-operated school;

(2) The child is on the membership roll of a State-supported school; or

(3)(i) The child was counted in average daily attendance by a State agency during the school year 1971-1972 or a subsequent year and is now enrolled in a program operated or supported by a local educational agency;

(ii) The child was enrolled in the State agency school for at least one school year (which may not be less than 180 school days);

(iii) The child continues to receive an appropriately designed educational program; and

(iv) The State agency transfers to the local educational agency in whose program the child is enrolled an amount equal to the sums received by the State agency under this Part which are attributable to that child.

(b) There is no minimum number of hours that a child must be receiving educational services per day in order for the child to be eligible to be placed on a membership roll under this section. The length of a school day shall be determined solely by the needs of the handicapped child, as reflected in the child's individualized education program.

(20 U.S.C. 241c-1(b).)

§ 116b.42 Education by more than one agency.

If a handicapped child is receiving free public education from more than one State agency, the State agency which is primarily responsible for the child's education (as determined by the State educational agency) shall be the only State agency to count that child under this part.

(20 U.S.C. 241c-1.)

§ 116b.43 Average daily attendance computation.

For the purposes of this part, average daily attendance means the total membership enrollment of handicapped children who are counted under § 116b.41.

(20 U.S.C. 241c-1(b).)

§ 116b.44 Data for counting and reporting average daily attendance.

(a) *State agency and local educational agency.* Each State agency and local educational agency shall count handicapped children (as specified in

§ 116b.41) on their membership rolls as of October 1 of each year and shall report their average daily attendance to the State educational agency.

(b) *State educational agency.* The State educational agency shall submit a report to the Commissioner by the following November 15 which sets forth the information submitted under paragraph (a) of this section.

(20 U.S.C. 241c-1 (b) and (d).)

§ 116b.45 Children counted under section 123.

A handicapped child who is counted in average daily attendance for the purpose of computing a grant under section 123 of the Act (program for neglected or delinquent children) may not be counted under this part.

(20 U.S.C. 241c-1(b).)

§ 116b.16 Children counted under Part B of the Education of the Handicapped Act.

A handicapped child who is counted for the purpose of computing a grant under Part B of the Education of the Handicapped Act may not be counted under this part.

(20 U.S.C. 241c-1(b).)

Comment. Effective October 1, 1977, section 611 (a)(5)(A)(iii) of Part B of the Education of the Handicapped Act requires that children counted under this part cannot be counted under Part B (References to other requirements of Part B are in Subpart II.) However, handicapped children who receive special education and related services from a State agency directly responsible for providing them with free public education may be counted under this Part or under Part B. In addition, handicapped children counted or eligible to be counted under this part may be served with Part B funds, if all requirements of Part B are met.

Subpart F—Program Requirements

§ 116b.50 The educational program.

(a) Each handicapped child counted under this part must be provided with an educational program designed to meet the child's special educational needs.

(b) The entire amount of funds generated by a child under this Part need not be spent on that child, as long as some of the funds are used to meet his or her individual special education needs. The remaining funds generated by that child may be spent on other handicapped children who are enrolled in the State-operated or State-supported school where the child is located, and who were counted under § 116b.41.

(c) A project may be supported in whole or in part with funds provided under this part. However, a State agency shall not use funds under this part to pay for its entire educational program for handicapped children.

(20 U.S.C. 241 (c) and (d).)

Comment. The benefits a child receives must be designed to meet the child's individualized special education needs. For example, the services of a State agency coordinator would not meet this requirement, unless the State agency can document that those services were designed to meet the child's individualized special education needs. Under Part B of the Education of the Handicapped Act, all special education and related services must be provided under an individualized education program. See §§ 121a.340-121a.349 of this chapter.

§ 116b.51 State standards.

(a) The State educational agency shall have standards insuring that each handicapped child counted under this part receives an appropriately designed education.

(b) The State educational agency shall insure that every child in a State-supported school is provided an education which meets the standards of the State educational agency.

(20 U.S.C. 241c-1.)

§ 116b.52 Maintenance of direction and control.

Each State agency and local educational agency which provides services with funds under this part through contracts with other public or private agencies (such as hospitals, clinics, colleges, universities, and elementary and secondary schools) shall maintain those services under its administrative and supervisory direction and control. A State agency or local educational agency may not provide all those services to handicapped children through contracts with other agencies.

(20 U.S.C. 241c-1.)

§ 116b.53 Dissemination.

Each State agency and local educational agency shall have effective procedures for acquiring and disseminating to teachers, administrators, and parents significant information derived from special educational research, demonstration and similar projects, and for adopting, where appropriate, promising special educational practices developed through these projects for use in program planning and operation under this part.

(20 U.S.C. 241c-1.)

§ 116b.54 Construction and equipment.

(a) Construction undertaken and equipment purchased under this part are subject to the requirements of § 116.32 of this chapter.

(b) Each State agency and local educational agency shall insure that appropriately trained staff will be available to use and operate any equipment acquired with funds under this part.

(20 U.S.C. 241c-1.)

§ 116b.55 Participation of children who were not counted.

Children who may be counted under § 116b.41 but who were not counted,

may be counted on a school's average daily attendance list.

(a) Children who were counted are not eligible for benefits from funds made available under this part; and

(b) All children who were counted are receiving an appropriately designed education commensurate with their needs.

(20 U.S.C. 241c-1.)

§ 116b.56 Participation in programs under Part 116a.

Nothing in this part precludes handicapped children from participating in projects funded under Part 116a of this chapter.

(20 U.S.C. 241c-1.)

Subpart C—Allowable Costs

§ 116b.60 General.

(a) *Cost principles.* Allowability of costs incurred under this part is determined in accordance with the cost principles referenced in § 100b.81 of this chapter and with Part 100c of the chapter.

(b) *Expenditures.* (1) Each agency may use funds under this part for expenditures which are reasonably necessary for activities directly related to the conduct of programs and projects to meet the special education needs of handicapped children.

(2) Permissible expenditures may include planning, evaluating, and disseminating the results of those activities.

(3) Administrative costs are allowable subject to section 143(b) of the Act (administrative costs of the State educational agency), and to Parts 100 and 100c of this chapter.

(20 U.S.C. 241c-2 and 241c(c).)

§ 116b.61 Special education and related services.

(a) Each agency may use funds under this part for the costs of special education and related services for handicapped children.

(b) The State agency may provide agency wide services (in addition to services located in particular schools) under this part, if it determines that the educational needs of handicapped children will be better served by that method of programmatic.

(20 U.S.C. 241c-3.)

§ 116b.62 Tuition and services.

(a) *Tuition.* An agency shall not use funds under this part for the payment of tuition or fees.

(b) *Services.* Parents of handicapped children served under this part shall not be charged for special education or related services provided for those children (including the cost of room and board and non medical care which are provided in an institutional resi-

dential care facility in which the child is placed for educational purposes).

(20 U.S.C. 241(c)(1))

§ 116b.63 Transportation costs.

Expenditures for transportation of handicapped children are allowable only under the following conditions:

(a) The State educational agency has determined that the transportation is essential to ensure the child's safety or to enable the child to benefit from the special education or the other related services being provided;

(b) The school in which the child is enrolled has made reasonable efforts to secure other means of or resources for transportation of the child;

(c) There is no State law requiring the provision of the service; and

(d) The transportation is not normally provided to other handicapped children by the agency in whose educational program the child is enrolled.

(20 U.S.C. 241(c)(1))

Subpart H—Requirements Under Part B of the Education of the Handicapped Act

§ 116b.70 Part B regulations.

Regulations under part B of the Education of the Handicapped Act are located in part 121a of this Chapter.

(20 U.S.C. 1417(b))

Comment: The Commissioner advises each respondent to read the current regulatory provisions in part 121a since those regula-

tions provide additional specific rules for meeting the requirements in §§ 116b.71 through 116b.74.

§ 116b.71 Supervision of programs for handicapped children.

Section 612(6) of the Education of the Handicapped Act requires that the State educational agency be responsible for ensuring that all educational programs for handicapped children within the State, including all programs administered by any other State or local agency, are under the general supervision of persons responsible for educational programs for handicapped children in the State educational agency.

(20 U.S.C. 1412(6).)

§ 116b.72 Use of funds for handicapped children.

(a) Section 613(a)(2) of the Education of the Handicapped Act requires each State to insure that funds provided under this part to assist in the education of handicapped children are used only in a manner consistent with a goal of providing a free appropriate public education for all handicapped children.

(b) Paragraph (a) of this section does not limit the requirements of this part or of section 121 of the Act.

(20 U.S.C. 1413(a)(2))

§ 116b.73 State educational agency standards.

Section 612(6) of the Education of the Handicapped Act requires that

any activity to assist the education of handicapped children under this Part meet the educational standards of the State educational agency.

(20 U.S.C. 1412(6).)

§ 116b.74 Withholding payments for non-compliance.

(a) Section 616(a)(2)(B) of the Education of the Handicapped Act provides that the Commissioner may withhold payments available under this Part for assisting the education of handicapped children:

(1) For failure to comply substantially with any provision of section 612 or 613 of the Education of the Handicapped Act; or

(2) In the administration of the annual program plan under part B of the Education of the Handicapped Act for failure to comply with:

(i) Any provision of part B of the Education of the Handicapped Act; or

(ii) Any requirements in the application of a local educational agency or intermediate educational unit approved by the State educational agency under that annual program plan.

(b) The Commissioner must use the notice and hearing procedures in section 616 of the Education of the Handicapped Act before withholding payments under this section.

(20 U.S.C. 1416.)

[FR Doc. 78 9731 Filed 4-14-78; 8:45 am]

THE BUCKLEY AMENDMENT
FAMILY EDUCATION RIGHTS AND PRIVACY ACT

20 U.S.C. §1232g

§ 1232g. Family educational and privacy rights—Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions.

(a)(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1976, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (C), confidential recommendations—

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(C) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (B), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such

waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4) (A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which—

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term "education records" does not include—

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) if the personnel of a law enforcement unit do not have access to education records under subsection (b)(1) of this section, the records and documents of such law enforcement unit which (I) are kept apart from records described in subparagraph (A), (II) are maintained solely for law enforcement purposes, and (III) are not made available to persons other than law enforcement officials of the same jurisdiction;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can

be personally reviewed by a physician or other appropriate professional of the student's choice.

(5)(A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of Federally-supported education programs; record-keeping

(b)(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C) authorized representatives of (i) the Comptroller General of the United States, (ii) the Secretary, (iii) an administrative head of an education agency (as defined in section 1221e—3(c) of this title), or (iv) State educational authorities, under the conditions set forth in paragraph (3) of this subsection;

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically required to be reported or disclosed pursuant

to State statute adopted prior to November 19, 1974;

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of Title 26; and

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons.

Nothing in clause (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection unless—

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency. —

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, (C) an administrative head of an education agency or (D) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education program, or in connection with the enforcement of the Federal legal requirements which relate to such programs: *Provided*, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained

access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student.

Surveys or data-gathering activities; regulations

(c) The Secretary shall adopt appropriate regulations to protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

Students' rather than parents' permission or consent

(d) For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

Informing parents or students of rights under this section

(e) No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

Enforcement; termination of assistance

(f) The Secretary, or an administrative head of an education agency, shall take appropriate actions to enforce provisions of this section and to deal with violations of this section, according to the provisions of this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with the provisions of this section, and he has determined that compliance cannot be secured by voluntary means.

Office and review board; creation; functions

(g) The Secretary shall establish or designate an office and review board within the Department of Health, Education, and Welfare for the purpose of investigating, processing, reviewing, and adjudicating violations of the provisions of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

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FINAL REGULATIONS UNDER THE BUCKLEY AMENDMENT

45 C.F.R. Part 99*

*With the organization of the new U.S. Department of Education, All regulations concerning education have been recodified. These regulations now appear at 34 C.F.R. Part 99. See 45 Fed. Reg. 77368 (November 21, 1980).

Subtitle A—Dept. of Health, Education, and Welfare

PART 99—PRIVACY RIGHTS OF PARENTS AND STUDENTS

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SOURCE: 41 FR 24670, June 17, 1976, unless otherwise noted.

AUTHORITY: Sec. 438, Pub. L. 90-247, Title IV, as amended, 88 Stat. 571-574 (20 U.S.C. 1232g).

Subpart A—General

§ 99.1 Applicability of part.

(a) This part applies to all educational agencies or institutions to which funds are made available under any Federal program for which the U.S. Commissioner of Education has administrative responsibility, as specified by law or by delegation of authority pursuant to law.] (20 U.S.C. 1230, 1232g)

§ 99.3

(b) This part does not apply to an educational agency or institution solely because students attending that non-monetary agency or institution receive benefits under one or more of the Federal programs referenced in paragraph (a) of this section, if no funds under those programs are made available to the agency or institution itself.

(c) For the purposes of this part, funds will be considered to have been made available to an agency or institution when funds under one or more of the programs referenced in paragraph (a) of this section: (1) Are provided to the agency or institution by grant, contract, subgrant, or subcontract, or (2) are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Basic Educational Opportunity Grants Program and the Guaranteed Student Loan Program (Titles IV-A-1 and IV-B, respectively, of the Higher Education Act of 1965, as amended). (20 U.S.C. 1232g)

(d) Except as otherwise specifically provided, this part applies to education records of students who are or have been in attendance at the educational agency or institution which maintains the records. (20 U.S.C. 1232g)

§ 99.2 Purpose.

The purpose of this part is to set forth requirements governing the protection of privacy of parents and students under section 438 of the General Education Provisions Act, as amended. (20 U.S.C. 1232g)

§ 99.3 Definitions.

As used in this Part:

"Act" means the General Education Provisions Act, Title IV of Pub. L. 90-247 as amended.

"Attendance" at an agency or institution includes, but is not limited to: (a) attendance in person and by correspondence, and (b) the period during which a person is working under a work-study program.

"Commissioner" means the U.S. Commissioner of Education. (20 U.S.C. 1232g)

"Directory information" includes the following information relating to a student: the student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and

awards received, the most recent previous educational agency or institution attended by the student, and other similar information.

(20 U.S.C. 1232g(a)(5)(A))

"Disclosure" means permitting access or the release, transfer, or other communication of education records of the student or the personally identifiable information contained therein, orally or in writing, or by electronic means, or by any other means to any party.

(20 U.S.C. 1232g(b)(1))

"Educational institution" or "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any Federal program referenced in § 99.1(a). The term refers to the agency or institution recipient as a whole, including all of its components (such as schools or departments in a university) and shall not be read to refer to one or more of these components separate from that agency or institution.

(20 U.S.C. 1232g(a)(3))

"Education records" (a) means those records which: (1) Are directly related to a student, and (2) are maintained by an educational agency or institution or by a party acting for the agency or institution.

(b) The term does not include:

(1) Records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which:

(i) Are in the sole possession of the maker thereof, and

(ii) Are not accessible or revealed to any other individual except a substitute. For the purpose of this definition, a "substitute" means an individual who performs on a temporary basis the duties of the individual who made the record, and does not refer to an individual who permanently succeeds the maker of the record in his or her position.

(2) Records of a law enforcement unit of an educational agency or institution which are:

(i) Maintained apart from the records described in paragraph (a) of this definition;

(ii) Maintained solely for law enforcement purposes, and

(iii) Not disclosed to individuals other than law enforcement officials of the same jurisdiction; *Provided*, That education records maintained by the educa-

tional agency or institution are not disclosed to the personnel of the law enforcement unit.

(3)(i) Records relating to an individual who is employed by an educational agency or institution which:

(A) Are made and maintained in the normal course of business;

(B) Relate exclusively to the individual in that individual's capacity as an employee, and

(C) Are not available for use for any other purpose.

(ii) This paragraph does not apply to records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student.

(4) Records relating to an eligible student which are:

(i) Created or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional or paraprofessional capacity, or assisting in that capacity;

(ii) Created, maintained, or used only in connection with the provision of treatment to the student, and

(iii) Not disclosed to anyone other than individuals providing the treatment; *Provided*, That the records can be personally reviewed by a physician or other appropriate professional of the student's choice. For the purpose of this definition, "treatment" does not include remedial educational activities or activities which are part of the program of instruction at the educational agency or institution.

(5) Records of an educational agency or institution which contain only information relating to a person after that person was no longer a student at the educational agency or institution. An example would be information collected by an educational agency or institution pertaining to the accomplishments of its alumni.

(20 U.S.C. 1232g(a)(4))

"Eligible student" means a student who has attained eighteen years of age, or is attending an institution of post-secondary education.

(20 U.S.C. 1232g(d))

"Financial Aid", as used in § 99.31(a)(4), means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) which is conditioned on the

individual's attendance at an educational agency or institution.

(20 U.S.C. 1232g(b)(1)(D))

"Institution of postsecondary education" means an institution which provides education to students beyond the secondary school level; "secondary school level" means the educational level (not beyond grade 12) at which secondary education is provided, as determined under State law.

(20 U.S.C. 1232g(d))

"Panel" means the body which will adjudicate cases under procedures set forth in §§ 99.65–99.67.

"Parent" includes a parent, a guardian, or an individual acting as a parent of a student in the absence of a parent or guardian. An educational agency or institution may presume the parent has the authority to exercise the rights inherent in the Act unless the agency or institution has been provided with evidence that there is a State law or court order governing such matters as divorce, separation or custody, or a legally binding instrument which provides to the contrary.

"Party" means an individual, agency, institution or organization.

(20 U.S.C. 1232g(b)(4)(A))

"Personally identifiable" means that the data or information includes (a) the name of a student, the student's parent, or other family member, (b) the address of the student, (c) a personal identifier, such as the student's social security number or student number, (d) a list of personal characteristics which would make the student's identity easily traceable, or (e) other information which would make the student's identity easily traceable.

(20 U.S.C. 1232g)

"Record" means any information or data recorded in any medium, including, but not limited to: handwriting, print, tapes, film, microfilm, and microfiche.

(20 U.S.C. 1232g)

"Secretary" means the Secretary of the U.S. Department of Health, Education, and Welfare.

(20 U.S.C. 1232g)

"Student" (a) includes any individual with respect to whom an educational agency or institution maintains education records.

(b) The term does not include an individual who has not been in attendance at an educational agency or institution. A person who has applied for admission to, but has never been in attendance at a component unit of an institution of postsecondary education (such as the various colleges or schools which comprise a university), even if that individual is or has been in attendance at another component unit of that institution of postsecondary education, is not considered to be a student with respect to the component to which an application for admission has been made.

(20 U.S.C. 1232g(a)(6))

§ 99.4 Student rights.

(a) For the purposes of this part, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the rights accorded to and the consent required of the parent of the student shall thereafter only be accorded to and required of the eligible student.

(b) The status of an eligible student as a dependent of his or her parents for the purposes of § 99.31(a)(8) does not otherwise affect the rights accorded to and the consent required of the eligible student by paragraph (a) of this section.

(20 U.S.C. 1232g(d))

(c) Section 438 of the Act and the regulations in this part shall not be construed to preclude educational agencies or institutions from according to students rights in addition to those accorded to parents of students.

§ 99.5 Formulation of institutional policy and procedures.

(a) Each educational agency or institution shall, consistent with the minimum requirements of section 438 of the Act and this part, formulate and adopt a policy of—

(1) Informing parents of students or eligible students of their rights under § 99.6;

(2) Permitting parents of students or eligible students to inspect and review the education records of the student in accordance with § 99.11, including at least:

(i) A statement of the procedure to be followed by a parent or an eligible student who requests to inspect and review the education records of the student;

(ii) With an understanding that it may not deny access to an education record, a description of the circumstances in

which the agency or institution feels it has a legitimate cause to deny a request for a copy of such records;

(iii) A schedule of fees for copies, and

(iv) A listing of the types and locations of education records maintained by the educational agency or institution and the titles and addresses of the officials responsible for those records;

(3) Not disclosing personally identifiable information from the education records of a student without the prior written consent of the parent of the student or the eligible student, except as otherwise permitted by §§ 99.31 and 99.37; the policy shall include, at least: (i) A statement of whether the educational agency or institution will disclose personally identifiable information from the education records of a student under § 99.31 (a) (1), and, if so, a specification of the criteria for determining which parties are "school officials" and what the educational agency or institution considers to be a "legitimate educational interest", and (ii) a specification of the personally identifiable information to be designated as directory information under § 99.37;

(4) Maintaining the record of disclosures of personally identifiable information from the education records of a student required to be maintained by § 99.32, and permitting a parent or an eligible student to inspect that record;

(5) Providing a parent of the student or an eligible student with an opportunity to seek the correction of education records of the student through a request to amend the records or a hearing under Subpart C, and permitting the parent of a student or an eligible student to place a statement in the education records of the student as provided in § 99.21(c);

(b) The policy required to be adopted by paragraph (a) of this section shall be in writing and copies shall be made available upon request to parents of students and to eligible students.

(20 U.S.C. 1232g (e) and (f))

§ 99.6 Annual notification of rights.

(a) Each educational agency or institution shall give parents of students in attendance or eligible students in attendance at the agency or institution annual notice by such means as are reasonably likely to inform them of the following:

(1) Their rights under section 438 of the Act, the regulations in this part, and the policy adopted under § 99.5; the no-

tice shall also inform parents of students or eligible students of the locations where copies of the policy may be obtained; and

(2) The right to file complaints under § 99.63 concerning alleged failures by the educational agency or institution to comply with the requirements of section 438 of the Act and this part.

(b) Agencies and institutions of elementary and secondary education shall provide for the need to effectively notify parents of students identified as having a primary or home language other than English.

(20 U.S.C. 1232g(e))

§ 99.7 Limitations on waivers.

(a) Subject to the limitations in this section and § 99.12, a parent of a student or a student may waive any of his or her rights under section 438 of the Act or this part. A waiver shall not be valid unless in writing and signed by the parent or student, as appropriate.

(b) An educational agency or institution may not require that a parent of a student or student waive his or her rights under section 438 of the Act or this part. This paragraph does not preclude an educational agency or institution from requesting such a waiver.

(c) An individual who is an applicant for admission to an institution of postsecondary education or is a student in attendance at an institution of postsecondary education may waive his or her right to inspect and review confidential letters and confidential statements of recommendation described in § 99.12(a) (3) except that the waiver may apply to confidential letters and statements only if: (1) The applicant or student is, upon request, notified of the names of all individuals providing the letters or statements; (2) the letters or statements are used only for the purpose for which they were originally intended, and (3) such waiver is not required by the agency or institution as a condition of admission to or receipt of any other service or benefit from the agency or institution.

(d) All waivers under paragraph (c) of this section must be executed by the individual, regardless of age, rather than by the parent of the individual.

(e) A waiver under this section may be made with respect to specified classes of: (1) Education records, and (2) persons or institutions.

(f) (1) A waiver under this section may be revoked with respect to any ac-

tions occurring after the revocation.

(2) A revocation under this paragraph must be in writing.

(3) If a parent of a student executes a waiver under this section, that waiver may be revoked by the student at any time after he or she becomes an eligible student.

(20 U.S.C. 1232g(a) (1) (B) and (C))

§ 99.8 Fees.

(a) An educational agency or institution may charge a fee for copies of education records which are made for the parents of students, students, and eligible students under section 438 of the Act and this part; *Provided*, That the fee does not effectively prevent the parents and students from exercising their right to inspect and review those records.

(b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student.

(20 U.S.C. 1232g(a) (1))

Subpart B—Inspection and Review of Education Records

§ 99.11 Right to inspect and review education records.

(a) Each educational agency or institution, except as may be provided by § 99.12, shall permit the parent of a student or an eligible student who is or has been in attendance at the agency or institution, to inspect and review the education records of the student. The agency or institution shall comply with a request within a reasonable period of time, but in no case more than 45 days after the request has been made.

(b) The right to inspect and review education records under paragraph (a) of this section includes:

(1) The right to a response from the educational agency or institution to reasonable requests for explanations and interpretations of the records; and

(2) The right to obtain copies of the records from the educational agency or institution where failure of the agency or institution to provide the copies would effectively prevent a parent or eligible student from exercising the right to inspect and review the education records.

(c) An educational agency or institution may presume that either parent of the student has authority to inspect and review the education records of the student unless the agency or institution has been provided with evidence that there is a legally binding instrument, or a State

law or court order governing such matters as divorce, separation or custody, which provides to the contrary.

§ 99.12 Limitations on right to inspect and review education records at the postsecondary level.

(a) An institution of postsecondary education is not required by section 438 of the Act of this part to permit a student to inspect and review the following records:

(1) Financial records and statements of their parents or any information contained therein;

(2) Confidential letters and confidential statements of recommendation which were placed in the education records of a student prior to January 1, 1975; *Provided*, That:

(i) The letters and statements were solicited with a written assurance of confidentiality, or sent and retained with a documented understanding of confidentiality, and

(ii) The letters and statements are used only for the purposes for which they were specifically intended;

(3) Confidential letters of recommendation and confidential statements of recommendation which were placed in the education records of the student after January 1, 1975:

(i) Respecting admission to an educational institution;

(ii) Respecting an application for employment, or

(iii) Respecting the receipt of an honor or honorary recognition; *Provided*, That the student has waived his or her right to inspect and review those letters and statements of recommendation under § 99.7(c).

(20 U.S.C. 1232g(a) (1) (B))

(b) If the education records of a student contain information on more than one student, the parent of the student or the eligible student may inspect and review or be informed of only the specific information which pertains to that student.

(20 U.S.C. 1232g(a) (1) (A))

§ 99.13 Limitation on destruction of education records.

An educational agency or institution is not precluded by section 438 of the Act or this part from destroying education records, subject to the following exceptions:

(a) The agency or institution may not destroy any education records if there is

an outstanding request to inspect and review them under § 99.11;

(b) Explanations placed in the education record under § 99.21 shall be maintained as provided in § 99.21(d), and

(c) The record of access required under § 99.32 shall be maintained for as long as the education record to which it pertains is maintained.

(20 U.S.C. 1232g(f))

Subpart C--Amendment of Education Records

§ 99.20 Request to amend education records.

(a) The parent of a student or an eligible student who believes that information contained in the education records of the student is inaccurate or misleading or violates the privacy or other rights of the student may request that the educational agency or institution which maintains the records amend them.

(b) The educational agency or institution shall decide whether to amend the education records of the student in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the educational agency or institution decides to refuse to amend the education records of the student in accordance with the request it shall so inform the parent of the student or the eligible student of the refusal, and advise the parent or the eligible student of the right to a hearing under § 99.21.

(20 U.S.C. 1232g(a)(2))

§ 99.21 Right to a hearing.

(a) An educational agency or institution shall, on request, provide an opportunity for a hearing in order to challenge the content of a student's education records to insure that information in the education records of the student is not inaccurate, misleading or otherwise in violation of the privacy or other rights of students. The hearing shall be conducted in accordance with § 99.22.

(b) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of students, it shall amend the education records of the student accordingly and so inform the parent of the student or the eligible student in writing.

(c) If, as a result of the hearing, the educational agency or institution decides

that the information is not inaccurate, misleading or otherwise in violation of the privacy or other rights of students, it shall inform the parent or eligible student of the right to place in the education records of the student a statement commenting upon the information in the education records and/or setting forth any reasons for disagreeing with the decision of the agency or institution.

(d) Any explanation placed in the education records of the student under paragraph (c) of this section shall:

(1) Be maintained by the educational agency or institution as part of the education records of the student as long as the record or contested portion thereof is maintained by the agency or institution, and

(2) If the education records of the student or the contested portion thereof is disclosed by the educational agency or institution to any party, the explanation shall also be disclosed to that party.

(20 U.S.C. 1232g(a)(2))

§ 99.22 Conduct of the hearing.

The hearing required to be held by § 99.21(a) shall be conducted according to procedures which shall include at least the following elements:

(a) The hearing shall be held within a reasonable period of time after the educational agency or institution has received the request, and the parent of the student or the eligible student shall be given notice of the date, place and time reasonably in advance of the hearing;

(b) The hearing may be conducted by any party, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing;

(c) The parent of the student or the eligible student shall be afforded a full and fair opportunity to present evidence relevant to the issues raised under § 99.21, and may be assisted or represented by individuals of his or her choice at his or her own expense, including an attorney;

(d) The educational agency or institution shall make its decision in writing within a reasonable period of time after the conclusion of the hearing; and

(e) The decision of the agency or institution shall be based solely upon the evidence presented at the hearing and shall include a summary of the evidence and the reasons for the decision.

(20 U.S.C. 1232g(c)(2))

Subpart D—Disclosure of Personally Identifiable Information From Education Records

§ 99.30 Prior consent for disclosure required.

(a) (1) An educational agency or institution shall obtain the written consent of the parent of a student or the eligible student before disclosing personally identifiable information from the education records of a student, other than directory information, except as provided in § 99.31.

(2) Consent is not required under this section where the disclosure is to (i) the parent of a student who is not an eligible student, or (ii) the student himself or herself.

(b) Whenever written consent is required, an educational agency or institution may presume that the parent of the student or the eligible student giving consent has the authority to do so unless the agency or institution has been provided with evidence that there is a legally binding instrument, or a State law or court order governing such matters as divorce, separation or custody, which provides to the contrary.

(c) The written consent required by paragraph (a) of this section must be signed and dated by the parent of the student or the eligible student giving the consent and shall include:

(1) A specification of the records to be disclosed,

(2) The purpose or purposes of the disclosure, and

(3) The party or class of parties to whom the disclosure may be made.

(d) When a disclosure is made pursuant to paragraph (a) of this section, the educational agency or institution shall, upon request, provide a copy of the record which is disclosed to the parent of the student or the eligible student, and to the student who is not an eligible student if so requested by the student's parents.

20 U.S.C. 1232g(b) (1) and (b) (2) (A))

§ 99.31 Prior consent for disclosure not required.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student without the written consent of the parent of the student or the eligible student if the disclosure is—

(1) To other school officials, including teachers, within the educational in-

stitution or local educational agency who have been determined by the agency or institution to have legitimate educational interests;

(2) To officials of another school or school system in which the student seeks or intends to enroll, subject to the requirements set forth in § 99.34;

(3) Subject to the conditions set forth in § 99.35, to authorized representatives of:

(i) The Comptroller General of the United States,

(ii) The Secretary,

(iii) The Commissioner, the Director of the National Institute of Education, or the Assistant Secretary for Education, or

(iv) State educational authorities;

(4) In connection with financial aid for which a student has applied or which a student has received; *Provided*, That personally identifiable information from the education records of the student may be disclosed only as may be necessary for such purposes as:

(i) To determine the eligibility of the student for financial aid,

(ii) To determine the amount of the financial aid,

(iii) To determine the conditions which will be imposed regarding the financial aid, or

(iv) To enforce the terms or conditions of the financial aid;

(5) To State and local officials or authorities to whom information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974. This subparagraph applies only to statutes which require that specific information be disclosed to State or local officials and does not apply to statutes which permit but do not require disclosure. Nothing in this paragraph shall prevent a State from further limiting the number or type of State or local officials to whom disclosures are made under this subparagraph;

(6) To organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction; *Provided*, That the studies are conducted in a manner which will not permit the personal identification of students and their parents by individuals

other than representatives of the organization and the information will be destroyed when no longer needed for the purposes for which the study was conducted; the term "organizations" includes, but is not limited to, Federal, State and local agencies, and independent organizations;

(7) To accrediting organizations in order to carry out their accrediting functions;

(8) To parents of a dependent student, as defined in section 152 of the Internal Revenue Code of 1954;

(9) To comply with a judicial order or lawfully issued subpoena; *Provided*, That the educational agency or institution makes a reasonable effort to notify the parent of the student or the eligible student of the order or subpoena in advance of compliance therewith; and

(10) To appropriate parties in a health or safety emergency subject to the conditions set forth in § 99.36.

(b) This section shall not be construed to require or preclude disclosure of any personally identifiable information from the education records of a student by an educational agency or institution to the parties set forth in paragraph (a) of this section.

(20 U.S.C. 1232g(b) (1))

§ 99.32 Record of disclosures required to be maintained.

(a) An educational agency or institution shall for each request for and each disclosure of personally identifiable information from the education records of a student, maintain a record kept with the education records of the student which indicates:

(1) The parties who have requested or obtained personally identifiable information from the education records of the student, and

(2) The legitimate interests these parties had in requesting or obtaining the information.

(b) Paragraph (a) of this section does not apply to disclosures to a parent of a student or an eligible student, disclosures pursuant to the written consent of a parent of a student or an eligible student when the consent is specific with respect to the party or parties to whom the disclosure is to be made, disclosures to school officials under § 99.31(a) (1), or to disclosures of directory information under § 99.37.

(c) The record of disclosures may be inspected;

(1) By the parent of the student or the eligible student,

(2) By the school official and his or her assistants who are responsible for the custody of the records, and

(3) For the purpose of auditing the recordkeeping procedures of the educational agency or institution by the parties authorized in, and under the conditions set forth in § 99.31(a) (1) and (3).

(20 U.S.C. 1232g(b) (4) (A))

§ 99.33 Limitation on redisclosure.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior written consent of the parent of the student or the eligible student, except that the personally identifiable information which is disclosed to an institution, agency or organization may be used by its officers, employees and agents, but only for the purposes for which the disclosure was made.

(b) Paragraph (a) of this section does not preclude an agency or institution from disclosing personally identifiable information under § 99.31 with the understanding that the information will be redisclosed to other parties under that section; *Provided*, That the recordkeeping requirements of § 99.32 are met with respect to each of those parties.

(c) An educational agency or institution shall, except for the disclosure of directory information under § 99.37, inform the party to whom a disclosure is made of the requirement set forth in paragraph (a) of this section.

(20 U.S.C. 1232g(b) (4) (B))

§ 99.34 Conditions for disclosure to officials of other schools and school systems.

(a) An educational agency or institution transferring the education records of a student pursuant to § 99.31(a) (2) shall:

(1) Make a reasonable attempt to notify the parent of the student or the eligible student of the transfer of the records at the last known address of the parent or eligible student, except:

(i) When the transfer of the records is initiated by the parent or eligible student at the sending agency or institution, or

(1) When the agency or institution includes a notice in its policies and procedures formulated under § 99.5 that it forwards education records on request to a school in which a student seeks or intends to enroll; the agency or institution does not have to provide any further notice of the transfer;

(2) Provide the parent of the student or the eligible student, upon request, with a copy of the education records which have been transferred; and

(3) Provide the parent of the student or the eligible student, upon request, with an opportunity for a hearing under Subpart C of this part.

(b) If a student is enrolled in more than one school, or receives services from more than one school, the schools may disclose information from the education records of the student to each other without obtaining the written consent of the parent of the student or the eligible student; *Provided*, That the disclosure meets the requirements of paragraph (a) of this section.

(20 U.S.C. 1232g(b)(1)(B))

§ 99.35. Disclosure to certain Federal and State officials for Federal program purposes.

(a) Nothing in section 438 of the Act or this part shall preclude authorized representatives of officials listed in § 99.31(a)(3) from having access to student and other records which may be necessary in connection with the audit and evaluation of Federally supported education programs, or in connection with the enforcement of or compliance with the Federal legal requirements which relate to these programs.

(b) Except when the consent of the parent of a student or an eligible student has been obtained under § 99.30, or when the collection of personally identifiable information is specifically authorized by Federal law, any data collected by officials listed in § 99.31(a)(3) shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, or enforcement of or compliance with Federal legal requirements.

20 U.S.C. 1232g(b)(3))

§ 99.36 Conditions for disclosure in health and safety emergencies.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

(b) The factors to be taken into account in determining whether personally identifiable information from the education records of a student may be disclosed under this section shall include the following:

(1) The seriousness of the threat to the health or safety of the student or other individuals;

(2) The need for the information to meet the emergency;

(3) Whether the parties to whom the information is disclosed are in a position to deal with the emergency; and

(4) The extent to which time is of the essence in dealing with the emergency.

(c) Paragraph (a) of this section shall be strictly construed.

(20 U.S.C. 1232g(b)(1)(I))

§ 99.37 Conditions for disclosure of directory information.

(a) An educational agency or institution may disclose personally identifiable information from the education records of a student who is in attendance at the institution or agency if that information has been designated as directory information (as defined in § 99.3) under paragraph (c) of this section.

(b) An educational agency or institution may disclose directory information from the education records of an individual who is no longer in attendance at the agency or institution without following the procedures under paragraph (c) of this section.

(c) An educational agency or institution which wishes to designate directory information shall give public notice of the following:

(1) The categories of personally identifiable information which the institution has designated as directory information;

(2) The right of the parent of the student or the eligible student to refuse to permit the designation of any or all of the categories of personally identifiable information with respect to that student as directory information; and

(3) The period of time within which the parent of the student or the eligible

student must inform the agency or institution in writing that such personally identifiable information is not to be designated as directory information with respect to that student.

(20 U.S.C. 1232g(a) (5) (A) and (B))

Subpart E—Enforcement

§ 99.60 Office and review board.

(a) The Secretary is required to establish or designate an office and a review board under section 438(g) of the Act. The office will investigate, process, and review violations, and complaints which may be filed concerning alleged violations of the provisions of section 438 of the Act and the regulations in this part. The review board will adjudicate cases referred to it by the office under the procedures set forth in §§ 99.65–99.67.

(b) The following is the address of the office which has been designated under paragraph (a) of this section: The Family Educational Rights and Privacy Act Office (FERPA), Department of Health, Education, and Welfare, 330 Independence Ave. SW., Washington, D.C. 20201.

(20 U.S.C. 1232g(g))

§ 99.61 Conflict with State or local law.

An educational agency or institution which determines that it cannot comply with the requirements of section 438 of the Act or of this part because a State or local law conflicts with the provisions of section 438 of the Act or the regulations in this part shall so advise the office designated under § 99.60(b) within 45 days of any such determination, giving the text and legal citation of the conflicting law.

(20 U.S.C. 1232g(f))

§ 99.62 Reports and records.

Each educational agency or institution shall (a) submit reports in the form and containing such information as the Office of the Review Board may require to carry out their functions under this part, and (b) keep the records and afford access thereto as the Office or the Review Board may find necessary to assure the correctness of those reports and compliance with the provisions of sections 438 of the Act and this part.

(20 U.S.C. 1232g(i) and (g))

§ 99.63 Complaint procedure.

(a) Complaints regarding violations of rights accorded parents and eligible stu-

dents by section 438 of the Act or the regulations in this part shall be submitted to the Office in writing.

(b) (1) The Office will notify each complainant and the educational agency or institution against which the violation has been alleged, in writing, that the complaint has been received.

(2) The notification to the agency or institution under paragraph (b) (1) of this section shall include the substance of the alleged violation and the agency or institution shall be given an opportunity to submit a written response.

(c) (1) The Office will investigate all timely complaints received to determine whether there has been a failure to comply with the provisions of section 438 of the Act or the regulations in this part, and may permit further written or oral submissions by both parties.

(2) Following its investigation the Office will provide written notification of its findings and the basis for such findings, to the complainant and the agency or institution involved.

(3) If the Office finds that there has been a failure to comply, it will include in its notification under paragraph (c)

(2) of this section, the specific steps which must be taken by the agency or educational institution to bring the agency or institution into compliance. The notification shall also set forth a reasonable period of time, given all of the circumstances of the case, for the agency or institution to voluntarily comply.

(d) If the educational agency or institution does not come into compliance within the period of time set under paragraph (c) (3) of this section, the matter will be referred to the Review Board for a hearing under §§ 99.64–99.67, inclusive.

(20 U.S.C. 1232g(f))

§ 99.64 Termination of funding.

If the Secretary, after reasonable notice and opportunity for a hearing by the Review Board, (1) finds that an educational agency or institution has failed to comply with the provisions of section 438 of the Act, or the regulations in this part, and (2) determines that compliance cannot be secured by voluntary means, he shall issue a decision, in writing, that no funds under any of the Federal programs referenced in § 99.1(a) shall be made available to that educational agency or institution (or, at the Secretary's discretion, to the unit of the educational agency or institution affected

by the failure to comply) until there is no longer any such failure to comply.
(20 U.S.C. 1232g(f))

§ 99.65 Hearing procedures.

(a) *Panels.* The Chairman of the Review Board shall designate Hearing Panels to conduct one or more hearings under § 99.64. Each Panel shall consist of not less than three members of the Review Board. The Review Board may, at its discretion, sit for any hearing or class of hearings. The Chairman of the Review Board shall designate himself or any other member of a Panel to serve as Chairman.

(b) *Procedural rules.* (1) With respect to hearings involving, in the opinion of the Panel, no dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the Panel shall take appropriate steps to afford to each party to the proceeding an opportunity for presenting his case at the option of the Panel (i) in whole or in part in writing or (ii) in an informal conference before the Panel which shall afford each party: (A) Sufficient notice of the issues to be considered (where such notice has not previously been afforded); and (B) an opportunity to be represented by counsel.

(2) With respect to hearings involving a dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the Panel shall afford each party an opportunity, which shall include, in addition to provisions required by subparagraph (1) (ii) of this paragraph, provisions designed to assure to each party the following:

(i) An opportunity for a record of the proceedings;

(ii) An opportunity to present witnesses on the party's behalf; and

(iii) An opportunity to cross-examine other witnesses either orally or through written interrogatories.

(20 U.S.C. 1232g(g))

§ 99.66 Hearing before Panel or a Hearing Officer.

A hearing pursuant to § 99.65(b) (2) shall be conducted, as determined by the

Panel Chairman, either before the Panel or a hearing officer. The hearing officer may be (a) one of the members of the Panel or (b) a nonmember who is appointed as a hearing examiner under 5 U.S.C. 3105.

(20 U.S.C. 1232g(g))

§ 99.67 Initial decision; final decision.

(a) The Panel shall prepare an initial written decision, which shall include findings of fact and conclusions based thereon. When a hearing is conducted before a hearing officer alone, the hearing officer shall separately find and state the facts and conclusions which shall be incorporated in the initial decision prepared by the Panel.

(b) Copies of the initial decision shall be mailed promptly by the Panel to each party (or to the party's counsel), and to the Secretary with a notice affording the party an opportunity to submit written comments thereon to the Secretary within a specified reasonable time.

(c) The initial decision of the Panel transmitted to the Secretary shall become the final decision of the Secretary, unless, within 25 days after the expiration of the time for receipt of written comments, the Secretary advises the Review Board in writing of his determination to review the decision.

(d) In any case in which the Secretary modifies or reverses the initial decision of the Panel, he shall accompany that action with a written statement of the grounds for the modification or reversal, which shall promptly be filed with the Review Board.

(e) Review of any initial decision by the Secretary shall be based upon the decision, the written record, if any, of the Panel's proceedings, and written comments or oral arguments by the parties, or by their counsel, to the proceedings.

(f) No decision under this section shall become final until it is served upon the educational agency or institution involved or its attorney.

(20 U.S.C. 1232g(g))

U.S. OFFICE FOR CIVIL RIGHTS
FINAL GUIDELINES FOR ELIMINATING
DISCRIMINATION AND DENIAL OF SERVICES
ON THE BASIS OF ... HANDICAP

From: 44 Fed. Reg. 17162 (March 21, 1979)*

*With the organization of the new U.S. Department of Education, all regulations concerning education will eventually be recodified at Title 34, Code of Federal Regulations. See 45 Fed. Reg. 30802 (May 9, 1980)

[4110-12-M]

Title 45—Public Welfare

**SUBTITLE A—DEPARTMENT OF
HEALTH, EDUCATION, AND WEL-
FARE**

**VOCATIONAL EDUCATION
PROGRAMS**

**Guidelines for Eliminating Discrimina-
tion and Denial of Services on the
Basis of Race, Color, National
Origin, Sex, and Handicap**

AGENCY: Office for Civil Rights, De-
partment of Health, Education, and
Welfare.

ACTION: Final Guidelines for Voca-
tional Education Programs.

SUMMARY: These guidelines explain
the civil rights responsibilities of re-
cipients of Federal funds offering or
administering vocational education
programs. They derive from and pro-
vide guidance supplementary to Title
VI of the Civil Rights Act of 1964 and
the implementing departmental regu-
lation (45 CFR Part 80), Title IX of
the Education Amendments of 1972
and the implementing departmental
regulation (45 CFR Part 86), and Sec-
tion 504 of the Rehabilitation Act of
1973 and the implementing depart-
mental regulation (45 CFR Part 84).

EFFECTIVE DATE: March 15, 1979.

**FOR FURTHER INFORMATION
CONTACT:**

David Gerard, Office of Standards,
Policy, and Research, Department of
Health, Education and Welfare,
Office for Civil Rights, 330 Indepen-
dence Avenue, S.W., Washington,
D.C. 20201 (telephone 202-245-9177).

SUPPLEMENTARY INFORMATION:
The following Guidelines explain how
civil rights laws and Department regu-
lations apply to vocational education
programs. They are issued as a result
of injunctive orders entered by the
United States District Court for the
District of Columbia in *Adams v. Cali-
fano*. They are also issued because the
Department has found evidence of
continuing unlawful discrimination in
vocational education programs.

A. LEGAL BASIS FOR THE GUIDELINES

Title VI of the Civil Rights Act of
1964 prohibits discrimination on the
basis of race, color, and national origin

in any program or activity receiving
Federal financial assistance. The De-
partment of Health, Education, and
Welfare issued regulations implement-
ing Title VI in 1965. Title IX of the
Education Amendments of 1972 pro-
hibits discrimination on the basis of
sex in education programs receiving or
benefiting from Federal financial as-
sistance. The Department issued regu-
lations implementing Title IX in 1975.
Section 504 of the Rehabilitation Act
of 1973 prohibits discrimination on the
basis of handicap in any program or
activity receiving Federal financial as-
sistance. The Department issued regu-
lations implementing Section 504 in
1977. These civil rights statutes and
their implementing regulations apply
to vocational education programs.

In 1973, the Department of Health,
Education, and Welfare was sued for
its failure to enforce Title VI in a
number of education areas, including
vocational education (*Adams v. Cali-
fano*). As a result of this litigation, the
Department was directed to enforce
civil rights requirements in vocational
education programs through compli-
ance reviews, a survey of enrollments
and related data, and the issuance of
guidelines explaining the application
of Title VI regulations to vocational
education. The Guidelines that follow
are issued to meet a requirement of
the *Adams* court orders.

B. FACTUAL BASIS FOR THE GUIDELINES

The Guidelines are also adopted be-
cause it is apparent that many voca-
tional education administrators
engage in unlawfully discriminatory
practices. They need additional guid-
ance and support from the Depart-
ment to meet their obligations under
civil rights authorities.

Information provided by the Office
of Education's Bureau of Occupational
and Adult Education for 1976 and 1977
reveals that male and female students
are concentrated in programs tradi-
tionally identified as intended for
them:

	Percent of total enrollment			
	1976		1977	
	Male	Female	Male	Female
Health occupations	21.2	78.8	21.2	78.8
Occupational home economics	15.3	84.7	16.1	83.9
Consumer and homemaking	16.8	83.2	16.4	83.6
Office occupations	24.9	75.1	24.9	75.1
Technical	88.7	11.3	83.0	17.0

Percent of total enrollment

	1976		1977	
	Male	Female	Male	Female
Trade and Industrial	87.3	12.7	85.6	14.4
Vocational Agriculture	88.7	11.3	85.2	14.8

In recent years vocational education administrators have addressed unlawful discrimination in their programs. Generally, they have taken advantage of the affirmative action provisions of the Vocational Education Amendments of 1976. Administrative procedures to implement these provisions are in place and are contributing to equal opportunity. Thus the above chart suggests that between 1976 and 1977, female participation increased in technical, trade and industrial, and vocational agriculture programs. There was also an increase in male participation in Consumer and Homemaking programs and Occupational Home Economics programs.

Current information on the enrollment of handicapped and minority students in specific vocational programs is not available. This deficiency will be corrected through the Office for Civil Rights Vocational Education Survey of 1979 and the Vocational Education Data System (VEDS) required by the Vocational Education Amendment of 1976. However, compliance reviews conducted by OCR investigative staff from 1973 to 1978 consistently found civil rights violations in vocational schools. For example:

1. Eligibility requirements such as residence within a geographic area or admissions tests deny vocational education opportunities on the basis of race, color, national origin and handicap;
2. Handicapped students are impermissibly assigned to separate annexes or branches; they are also denied equal vocational education opportunities as a result of inaccessible facilities and inadequate evaluation procedures;
3. Vocational schools established for students of one race, national origin or sex continue as essentially segregated facilities;
4. National origin minorities with limited proficiency in English are denied equal opportunity to participate in vocational programs;
5. Vocational education administrators often fail to adequately protect against discrimination in the placement of students with employers;
6. Faculty and staff are assigned to vocational programs on the basis of race, national origin, sex and handicap.

Reports from advocate groups have identified other possible civil rights violations. For example, the N.A.A.C.P. Legal Defense Fund (LDF)

has alleged that State agencies engage in unlawful discrimination against urban areas in the allocation of Federal vocational education funds.

C. SCOPE OF GUIDELINES

The Guidelines primarily address the civil rights violations listed immediately above as found in compliance reviews. They do not identify every civil rights violation that may arise in a vocational education setting. The Guidelines derive from and supplement and must be read in conjunction with civil rights laws and Department regulations.

Section III of the Guidelines, which prohibits discrimination in the allocation of vocational education funds, derives in part from and must be read in conjunction with the Vocational Education Act and Office of Education implementing regulations. These Guidelines, particularly Section III, have been reviewed by the Department's Office of Education and found consistent with its policies.

D. STATE AGENCY RESPONSIBILITIES

Most comments on the Guidelines sought deletion or clarification of, or a change to, a stated paragraph or subparagraph. However, Section II, which records the responsibilities of State agency personnel, was questioned in its entirety as imposing a new burden more reasonably assigned to the Office for Civil Rights.

Section II contains two requirements. First, State agencies in performing any activity required under State or Federal law, must be certain that they do not "require, approve of, or engage in" any unlawful discrimination. For example, State agencies are often required to review or approve the site selected by or the building specifications approved by local school district officials to assure that the project is fiscally sound. The Guidelines provide that in such cases the State agency must also examine whether the site location will result in the denial of access to minority group persons and whether the building and programs will be inaccessible to handicapped persons. If it finds such violations the State agency cannot approve the project. The second requirement of Section II is generally addressed to the agency referred to in the Vocational Education Amendments of 1976 as the "State Board or agency . . . solely responsible for the administration or . . . supervision of the programs [conducted in the State] under the Act." These agencies are required by the Guidelines to monitor subrecipients for civil rights compliance through technical assistance, analysis of already compiled information and data, and periodic compliance reviews.

These are not new requirements. The first merely restates what has become axiomatic—a recipient cannot engage or participate in unlawful discrimination. The second requirement—monitoring subrecipients for compliance—derives from the Department's Title VI regulation which provides in subparagraph 80.4(b):

Every application by a State or State agency to carry out a program involving continuing Federal financial assistance . . . shall . . . provide or be accompanied by provision for such methods of administration . . . as are found by the responsible Department official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this regulation.

Thus the Department's Title VI regulation requires State agency recipients to adopt and obtain Department approval for methods and procedures through which subrecipients can be monitored for compliance with civil rights authorities.¹

It was suggested that it is "unrealistic" to expect closely aligned officials—State agency and local personnel—to work at odds with each other. This is neither the intent nor the expected result of the final Guidelines. Many forms of impermissible discrimination are caused by misunderstandings or lack of information and guidance on the requirements of the law. State agency personnel should therefore be of assistance to and not in conflict with local personnel. Moreover, there is a need for additional conciliatory rather than adversarial compliance activity.

State agencies also argued that the Office for Civil Rights cannot and should not delegate its responsibilities for civil rights enforcement to recipients. Such a result is neither intended nor expected. The Guidelines contemplate adding, not substituting, resources for civil rights compliance activity. The Bureau of Occupational and Adult Education presently monitors State agencies for compliance with the Vocational Education Act. Under the Guidelines, BOAE and State agencies will engage in activities supplementary to those of the Office for Civil Rights.² These Guidelines do

¹ Although the regulations for Title IX and Section 504 do not assign a similar responsibility to State agencies, the Department intends to issue a Notice of Proposed Rulemaking to eliminate this inconsistency with Title VI. If revisions to the Title IX and Section 504 regulations are not adopted by the Department, these Guidelines must be revised.

² State agencies will require additional assistance from OCR and BOAE to understand and meet their responsibilities under the Guidelines. Such assistance will be provided through memoranda to be issued during the next 90 days. See comment and response number 9, below.

not contemplate any reduction of OCR compliance and enforcement activity. And OCR will lead, assist and monitor BOA's and State agencies in their civil rights activities. This approach derives from the Department's commitment to bring all of its agencies and recipients to the critical task of obtaining compliance with civil rights laws and regulations. It is also supported by the United States Civil Rights Commission.

CONCLUSION

Vocational education is a critical and growing sector of the Nation's education system. It is offered in over 14,000 school districts and in community and junior colleges. It is also provided through more than 2,000 secondary and postsecondary vocational education centers (often known as Area Vocational Education Schools, or AVES), that have as their primary or sole objective the teaching of skills that lead to employment. The variations of programs and courses number in the thousands. They include, for example, "work study" for students needing part-time employment to support their vocational studies, "cooperative education" for students who receive credit for work at jobs related to their vocational field and "apprentice training" for students affiliated with a labor union or another sponsor. Whatever the organization of vocational education, it is closely tied to the skill development needs of communities, States, and regions. Obtaining compliance with civil rights authorities in these diverse programs will require the participation and cooperation of all vocational education administrators and all agencies of the Department of Health, Education and Welfare. These Guidelines are designed to encourage that cooperation and compliance activity. They are provided with the expectation that they will contribute to bringing an end to unlawful discrimination against persons seeking the skills necessary for gainful and meaningful employment.

PART 80—NONDISCRIMINATION UNDER PROGRAMS RECEIVING FEDERAL ASSISTANCE THROUGH THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

1. In 45 CFR Part 80 Appendix B is added to read as follows:

¹United States Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort—1974*, Vol. VI, To Extend Federal Financial Assistance 1975, p. 809

APPENDIX B GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

1. SCOPE AND COVERAGE.

A. APPLICATION OF GUIDELINES

These Guidelines apply to recipients of any Federal financial assistance from the Department of Health, Education, and Welfare that offer or administer programs of vocational education or training. This includes State agency recipients.

B. DEFINITION OF RECIPIENT

The definition of "recipient" of Federal financial assistance is established by Department regulations implementing Title VI, Title IX, and Section 504 (45 CFR 80.13(c), 86.2(h), 84.3(f)).

For the purposes of Title VI:

The term "recipient" means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assignee, or transferee thereof, but such term does not include any ultimate beneficiary (e.g., students) under any such program (45 CFR 80.13(c)).

For the purpose of Title IX:

"Recipient" means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof (45 CFR 86.2(h)).

For the purposes of Section 504:

"Recipient" means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient but excluding the ultimate beneficiary of the assistance. (45 CFR 84.3(f)).

C. EXAMPLES OF RECIPIENTS COVERED BY THESE GUIDELINES

The following education agencies, when they provide vocational education, are examples of recipients covered by these Guidelines:

1. The board of education of a public school district and its administrative agency.
2. The administrative board of a specialized vocational high school serving students from more than one school district.
3. The administrative board of a technical or vocational school that is used exclusively or principally for the provision of vocational education to persons who have completed or left high school including persons seeking a certificate or an associate degree through a vocational program offered by the school and who are available for study in preparation for entering the labor market.

4. The administrative board of a postsecondary institution, such as a technical institute, skill center, junior college, community college, or four-year college that has a department or division that provides vocational education to students seeking immediate employment, a certificate or an associate degree.

5. The administrative board of a proprietary (private) vocational education school.

6. A State agency recipient itself operating a vocational education facility.

D. EXAMPLES OF SCHOOLS TO WHICH THESE GUIDELINES APPLY

The following are examples of the types of schools to which these Guidelines apply.

1. A junior high school, middle school, or those grades of a comprehensive high school that offers instruction to inform, orient, or prepare students for vocational education at the secondary level.
2. A vocational education facility operated by a State agency.
3. A comprehensive high school that has a department exclusively or principally used for providing vocational education; or that offers at least one vocational program to secondary level students who are available for study in preparation for entering the labor market, or that offers adult vocational education to persons who have completed or left high school and who are available for study in preparation for entering the labor market.
4. A comprehensive high school, offering the activities described above, that receives students on a contract basis from other school districts for the purpose of providing vocational education.
5. A specialized high school used exclusively or principally for the provision of vocational education, that enrolls students from one or more school districts for the purpose of providing vocational education.
6. A technical or vocational school that primarily provides vocational education to persons who have completed or left high school and who are available for study in preparation for entering the labor market, including students seeking an associate degree or certificate through a course of vocational instruction offered by the school.
7. A junior college, a community college, or four-year college that has a department or division that provides vocational education to students seeking immediate employment, an associate degree or a certificate through a course of vocational instruction offered by the school.
8. A proprietary school, licensed by the State, that offers vocational education.

NOTE.—Subsequent sections of these Guidelines may use the term *secondary vocational education center* in referring to the institutions described in paragraphs 3, 4 and 5 above or the term *postsecondary vocational education center* in referring to institutions described in paragraphs 6 and 7 above or the term *vocational education center* in referring to any or all institutions described above.

II. RESPONSIBILITIES ASSIGNED ONLY TO STATE AGENCY RECIPIENTS

A. RESPONSIBILITIES OF ALL STATE AGENCY RECIPIENTS

State agency recipients, in addition to complying with all other provisions of the Guidelines relevant to them, may not require, approve of, or engage in any discrimi-

nation or denial of services on the basis of race, color, national origin, sex, or handicap in performing any of the following activities:

1. Establishment of criteria or formulas for distribution of Federal or State funds to vocational education programs in the State.
2. Establishment of requirements for admission to or requirements for the administration of vocational education programs.
3. Approval of action by local entities providing vocational education. (For example, a State agency must ensure compliance with Section IV of these Guidelines if and when it reviews a vocational education agency decision to create or change a geographic service area.)
4. Conducting its own programs. (For example, in employing its staff it may not discriminate on the basis of sex or handicap.)

B. STATE AGENCIES PERFORMING OVERSIGHT RESPONSIBILITIES

The State agency responsible for the administration of vocational education programs must adopt a compliance program to prevent, identify and remedy discrimination on the basis of race, color, national origin, sex or handicap by its subrecipients. (A "subrecipient," in this context, is a local agency or vocational education center that receives financial assistance through a State agency.) This compliance program must include:

1. Collecting and analyzing civil rights related data and information that subrecipients compile for their own purposes or that are submitted to State and Federal officials under existing authorities;
2. Conducting periodic compliance reviews of selected subrecipients (i.e., an investigation of a subrecipient to determine whether it engages in unlawful discrimination in any aspect of its program), upon finding unlawful discrimination, notifying the subrecipient of steps it must take to attain compliance and attempting to obtain voluntary compliance;
3. Providing technical assistance upon request to subrecipients. This will include assisting subrecipients identify unlawful discrimination and instructing them in remedies for and prevention of such discrimination;
4. Periodically reporting its activities and findings under the foregoing paragraphs, including findings of unlawful discrimination under paragraph 2. Immediately above, to the Office for Civil Rights.

State agencies are not required to terminate or defer assistance to any subrecipient. Nor are they required to conduct hearings. The responsibilities of the Office for Civil Rights to collect and analyze data, to conduct compliance reviews, to investigate complaints and to provide technical assistance are not diminished or attenuated by the requirements of Section II of the Guidelines.

C. STATEMENT OF PROCEDURES AND PRACTICES

Within one year from the publication of these Guidelines in final form, each State agency recipient performing oversight responsibilities must submit to the Office for Civil Rights the methods of administration and related procedures it will follow to comply with the requirements described in paragraphs A and B immediately above. The Department will review each submission and will promptly either approve it, or return it to State officials for revision.

III. DISTRIBUTION OF FEDERAL FINANCIAL ASSISTANCE AND OTHER FUNDS FOR VOCATIONAL EDUCATION

A. AGENCY RESPONSIBILITIES

Recipients that administer grants for vocational education must distribute Federal, State, or local vocational education funds so that no student or group of students is unlawfully denied an equal opportunity to benefit from vocational education on the basis of race, color, national origin, sex, or handicap.

B. DISTRIBUTION OF FUNDS

Recipients may not adopt a formula or other method for the allocation of Federal, State, or local vocational education funds that has the effect of discriminating on the basis of race, color, national origin, sex, or handicap. However, a recipient may adopt a formula or other method of allocation that uses as a factor race, color, national origin, sex, or handicap for an index or proxy for race, color, national origin, sex, or handicap (e.g., number of persons receiving Aid to Families with Dependent Children or with limited English speaking ability) if the factor is included to compensate for past discrimination or to comply with those provisions of the Vocational Education Amendments of 1976 designed to assist specified protected groups.

C. EXAMPLE OF A PATTERN SUGGESTING UNLAWFUL DISCRIMINATION

In each State it is likely that some local recipients will enroll greater proportions of minority students in vocational education than the State-wide proportion of minority students in vocational education. A funding formula or other method of allocation that results in such local recipients receiving per-pupil allocations of Federal or State vocational education funds lower than the State-wide average per-pupil allocation will be presumed unlawfully discriminatory.

D. DISTRIBUTION THROUGH COMPETITIVE GRANTS OR CONTRACTS

Each State agency that establishes criteria for awarding competitive vocational education grants or contracts must establish and apply the criteria without regard to the race, color, national origin, sex, or handicap of any or all of a recipient's students, except to compensate for past discrimination.

E. APPLICATION PROCESSES FOR COMPETITIVE OR DISCRETIONARY GRANTS

State agencies must disseminate information needed to satisfy the requirements of any application process for competitive or discretionary grants so that all recipients, including those having a high percentage of minority or handicapped students, are informed of and able to seek funds. State agencies that provide technical assistance for the completion of the application process must provide such assistance without discrimination against any one recipient or class of recipients.

F. ALTERATION OF FUND DISTRIBUTION TO PROVIDE EQUAL OPPORTUNITY

If the Office for Civil Rights finds that a recipient's system for distributing vocational education funds unlawfully discriminates on the basis of race, color, national origin, sex, or handicap, it will require the recipient to adopt an alternative nondiscriminatory

method of distribution. The Office for Civil Rights may also require the recipient to compensate for the effects of its past unlawful discrimination in the distribution of funds.

IV. ACCESS AND ADMISSION OF STUDENTS TO VOCATIONAL EDUCATION PROGRAMS

A. RECIPIENT RESPONSIBILITIES

Criteria controlling student eligibility for admission to vocational education schools, facilities and programs may not unlawfully discriminate on the basis of race, color, national origin, sex, or handicap. A recipient may not develop, impose, maintain, approve, or implement such discriminatory admissions criteria.

B. SITE SELECTION FOR VOCATIONAL SCHOOLS

State and local recipients may not select or approve a site for a vocational education facility for the purpose or with the effect of excluding, segregating, or otherwise discriminating against students on the basis of race, color, or national origin. Recipients must locate vocational education facilities at sites that are readily accessible to both nonminority and minority communities, and that do not tend to identify the facility or program as intended for nonminority or minority students.

C. ELIGIBILITY FOR ADMISSION TO VOCATIONAL EDUCATION CENTERS BASED ON RESIDENCE

Recipients may not establish, approve or maintain geographic boundaries for a vocational education center service area or attendance zone, (hereinafter "service area"), that unlawfully exclude students on the basis of race, color, or national origin. The Office for Civil Rights will presume, subject to rebuttal, that any one or combination of the following circumstances indicates that the boundaries of a given service area are unlawfully constituted:

1. A school system or service area contiguous to the given service area, contains minority or nonminority students in substantially greater proportion than the given service area;
2. A substantial number of minority students who reside outside the given vocational education center service area, and who are not eligible for the center reside, nonetheless, as close to the center as a substantial number of non-minority students who are eligible for the center;
3. The over-all vocational education program of the given service area in comparison to the over-all vocational education program of a contiguous school system or service area enrolling a substantially greater proportion of minority students, (a) provides its students with a broader range of curricular offerings, facilities and equipment, or (b) provides its graduates greater opportunity for employment in jobs, (i) for which there is a demonstrated need in the community or region, (ii) that pay higher entry level salaries or wages, or (iii) that are generally acknowledged to offer greater prestige or status.

D. ADDITIONS AND RENOVATIONS TO EXISTING VOCATIONAL EDUCATION FACILITIES

A recipient may not add to, modify, or renovate the physical plant of a vocational education facility in a manner that creates, maintains, or increases student segregation on the basis of race, color, national origin, sex, or handicap.

E. REMEDIES FOR VIOLATIONS OF SITE SELECTION AND GEOGRAPHIC SERVICE AREA REQUIREMENTS

If the conditions specified in paragraphs IV, A, B, C, or D, immediately above, are found and not rebutted by proof of nondiscrimination, the Office for Civil Rights will require the recipient(s) to submit a plan to remedy the discrimination. The following are examples of steps that may be included in the plan, where necessary to overcome the discrimination: (1) redrawing of the boundaries of the vocational education center's service area to include areas unlawfully excluded and/or to exclude areas unlawfully included; (2) provision of transportation to students residing in areas unlawfully excluded; (3) provision of additional programs and services to students who would have been eligible for attendance at the vocational education center but for the discriminatory service area or site selection; (4) reassignment of students; and (5) construction of new facilities or expansion of existing facilities.

F. ELIGIBILITY FOR ADMISSION TO SECONDARY VOCATIONAL EDUCATION CENTERS BASED ON NUMERICAL LIMITS IMPOSED ON SENDING SCHOOLS

A recipient may not adopt or maintain a system for admission to a secondary vocational education center or program that limits admission to a fixed number of students from each sending school included in the center's service area if such a system disproportionately excludes students from the center on the basis of race, sex, national origin or handicap. (Example: Assume 25 percent of a school district's high school students are black and that most of those black students are enrolled in one high school, the white students, 75 percent of the district's total enrollment, are generally enrolled in the five remaining high schools. This paragraph prohibits a system of admission to the secondary vocational education center that limits eligibility to a fixed and equal number of students from each of the district's six high schools.)

G. REMEDIES FOR VIOLATION OF ELIGIBILITY BASED ON NUMERICAL LIMITS REQUIREMENTS

If the Office for Civil Rights finds a violation of paragraph F, above, the recipient must implement an alternative system of admissions that does not disproportionately exclude students on the basis of race, color, national origin, sex, or handicap.

H. ELIGIBILITY FOR ADMISSION TO VOCATIONAL EDUCATION CENTERS, BRANCHES OR ANNEXES BASED UPON STUDENT OPTION

A vocational education center, branch or annex, open to all students in a service area and predominantly enrolling minority students or students of one race, national origin or sex, will be presumed unlawfully segregated if: (1) it was established by a recipient for members of one race, national origin or sex; or (2) it has since its construction been attended primarily by members of one race, national origin or sex; or (3) most of its program offerings have traditionally been selected predominantly by members of one race, national origin or sex.

I. REMEDIES FOR FACILITY SEGREGATION UNDER STUDENT OPTION PLANS

If the conditions specified in paragraph IV, H are found and not rebutted by proof

of nondiscrimination, the Office for Civil Rights will require the recipient(s) to submit a plan to remedy the segregation. The following are examples of steps that may be included in the plan, where necessary to overcome the discrimination:

- (1) elimination of program duplication in the segregated facility and other proximate vocational facilities; (2) relocation or "clustering" of programs or courses; (3) adding programs and courses that traditionally have been identified as intended for members of a particular race, national origin or sex to schools that have traditionally served members of the other sex or traditionally served persons of a different race or national origin; (4) merge of programs into one facility through school closings or new construction; (5) intensive outreach recruitment and counseling; (6) providing free transportation to students whose enrollment would promote desegregation.

[Paragraph J omitted]

K. ELIGIBILITY BASED ON EVALUATION OF EACH APPLICANT UNDER ADMISSIONS CRITERIA

Recipients may not judge candidates for admission to vocational education programs on the basis of criteria that have the effect of disproportionately excluding persons of a particular race, color, national origin, sex, or handicap. However, if a recipient can demonstrate that such criteria have been validated as essential to participation in a given program and that alternative equally valid criteria that do not have such a disproportionate adverse effect are unavailable, the criteria will be judged nondiscriminatory. Examples of admissions criteria that must meet this test are past academic performance, record of disciplinary infractions, counselors' approval, teachers' recommendations, interest inventories, high school diplomas and standardized tests, such as the Test of Adult Basic Education (TABE).

An introductory, preliminary, or exploratory course may not be established as a prerequisite for admission to a program unless the course has been and is available without regard to race, color, national origin, sex, and handicap. However, a course that was formerly only available on a discriminatory basis may be made a prerequisite for admission to a program if the recipient can demonstrate that: (a) the course is essential to participation in the program; and (b) the course is presently available to those seeking enrollment for the first time and to those formerly excluded.

L. ELIGIBILITY OF NATIONAL ORIGIN MINORITY PERSONS WITH LIMITED ENGLISH LANGUAGE SKILLS

Recipients may not restrict an applicant's admission to vocational education programs because the applicant, as a member of a national origin minority with limited English language skills, cannot participate in and benefit from vocational instruction to the same extent as a student whose primary language is English. It is the responsibility of the recipient to identify such applicants and assess their ability to participate in vocational instruction.

Acceptable methods of identification include: (1) identification by administrative staff, teachers, or parents of secondary level students; (2) identification by the student in postsecondary or adult programs; and (3) appropriate diagnostic procedures, if necessary.

Recipients must take steps to open all vocational programs to these national origin minority students. A recipient must demonstrate that a concentration of students with limited English language skills in one or a few programs is not the result of discriminatory limitations upon the opportunities available to such students.

M. REMEDIAL ACTION IN BEHALF OF PERSONS WITH LIMITED ENGLISH LANGUAGE SKILLS

If the Office for Civil Rights finds that a recipient has denied national origin minority persons admission to a vocational school or program because of their limited English language skills or has assigned students to vocational programs solely on the basis of their limited English language skills, the recipient will be required to submit a remedial plan that insures national origin minority students equal access to vocational education programs.

N. EQUAL ACCESS FOR HANDICAPPED STUDENTS

Recipients may not deny handicapped students access to vocational education programs or courses because of architectural or equipment barriers, or because of the need for related aids and services or auxiliary aids. If necessary, recipients must: (1) modify instructional equipment; (2) modify or adapt the manner in which the courses are offered; (3) house the program in facilities that are readily accessible to mobility impaired students or alter facilities to make them readily accessible to mobility impaired students; and (4) provide auxiliary aids that effectively make lectures and necessary materials available to postsecondary handicapped students; (5) provide related aids or services that assure secondary students an appropriate education.

Academic requirements that the recipient can demonstrate are essential to a program of instruction or to any directly related licensing requirement will not be regarded as discriminatory. However, where possible, a recipient must adjust those requirements to the needs of individual handicapped students.

Access to vocational programs or courses may not be denied handicapped students on the ground that employment opportunities in any occupation or profession may be more limited for handicapped persons than for non-handicapped persons.

O. PUBLIC NOTIFICATION

Prior to the beginning of each school year, recipients must advise students, parents, employees and the general public that all vocational opportunities will be offered without regard to race, color, national origin, sex, or handicap. Announcement of this policy of non-discrimination may be made, for example, in local newspapers, recipient publications and/or other media that reach the general public, program beneficiaries, minorities (including national origin minorities with limited English language skills), women, and handicapped persons. A brief summary of program offerings and admission criteria should be included in the announcement; also the name, address and telephone number of the person designated to coordinate Title IX and Section 504 compliance activity.

If a recipient's service area contains a community of national origin minority persons with limited English language skills, public notification materials must be disseminated to that community in its lan-

guage and must state that recipients will take steps to assure that the lack of English language skill will not be a barrier to admission and participation in vocational education programs.

V. COUNSELING AND PREVOCATIONAL PROGRAMS

A. RECIPIENT RESPONSIBILITIES

Recipients must insure that their counseling materials and activities (including student program selection and career/employment selection), promotional, and recruitment efforts do not discriminate on the basis of race, color, national origin, sex, or handicap.

B. COUNSELING AND PROSPECTS FOR SUCCESS

Recipients that operate vocational education programs must insure that counselors do not direct or urge any student to enroll in a particular career or program, or measure or predict a student's prospects for success in any career or program based upon the student's race, color, national origin, sex, or handicap. Recipients may not counsel handicapped students toward more restrictive career objectives than nonhandicapped students with similar abilities and interests. If a vocational program disproportionately enrolls male or female students, minority or nonminority students, or handicapped students, recipients must take steps to insure that the disproportion does not result from unlawful discrimination in counseling activities.

C. STUDENT RECRUITMENT ACTIVITIES

Recipients must conduct their student recruitment activities so as not to exclude or limit opportunities on the basis of race, color, national origin, sex, or handicap. Where recruitment activities involve the presentation or portrayal of vocational and career opportunities, the curricula and programs described should cover a broad range of occupational opportunities and not be limited on the basis of the race, color, national origin, sex, or handicap of the students or potential students to whom the presentation is made. Also, to the extent possible, recruiting teams should include persons of different races, national origins, sexes, and handicaps.

D. COUNSELING OF STUDENTS WITH LIMITED ENGLISH SPEAKING ABILITY OR HEARING IMPAIRMENTS

Recipients must insure that counselors can effectively communicate with national origin minority students with limited English language skills and with students who have hearing impairments. This requirement may be satisfied by having interpreters available.

E. PROMOTIONAL ACTIVITIES

Recipients may not undertake promotional efforts (including activities of school officials, counselors, and vocational staff) in a manner that creates or perpetuates stereotypes or limitations based on race, color, national origin, sex, or handicap. Examples of promotional efforts are career days, parents' night, shop demonstrations, visitations by groups of prospective students and by representatives from business and industry. Materials that are part of promotional efforts may not create or perpetuate stereotypes through text or illustration. To the

extent possible they should portray males or females, minorities or handicapped persons in programs and occupations in which these groups traditionally have not been represented. If a recipient's service area contains a community of national origin minority persons with limited English language skills, promotional literature must be distributed to that community in its language.

VI. EQUAL OPPORTUNITY IN THE VOCATIONAL EDUCATION INSTRUCTIONAL SETTING

A. ACCOMMODATIONS FOR HANDICAPPED STUDENTS

Recipients must place secondary level handicapped students in the regular educational environment of any vocational education program to the maximum extent appropriate to the needs of the student unless it can be demonstrated that the education of the handicapped person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Handicapped students may be placed in a program only after the recipient satisfies the provisions of the Department's Regulation, 45 CFR Part 84, relating to evaluation, placement, and procedural safeguards. If a separate class or facility is identifiable as being for handicapped persons, the facility, the programs, and the services must be comparable to the facilities, programs, and services offered to nonhandicapped students.

B. STUDENT FINANCIAL ASSISTANCE

Recipients may not award financial assistance in the form of loans, grants, scholarships, special funds, subsidies, compensation for work, or prizes to vocational education students on the basis of race, color, national origin, sex, or handicap, except to overcome the effects of past discrimination. Recipients may administer sex restricted financial assistance where the assistance and restriction are established by will, trust, bequest, or any similar legal instrument, if the overall effect of all financial assistance awarded does not discriminate on the basis of sex. Materials and information used to notify students of opportunities for financial assistance may not contain language or examples that would lead applicants to believe the assistance is provided on a discriminatory basis. If a recipient's service area contains a community of national origin minority persons with limited English language skills, such information must be disseminated to that community in its language.

C. HOUSING IN RESIDENTIAL POSTSECONDARY VOCATIONAL EDUCATION CENTERS

Recipients must extend housing opportunities without discrimination based on race, color, national origin, sex, or handicap. This obligation extends to recipients that provide on campus housing and/or that have agreements with providers of off-campus housing. In particular, a recipient postsecondary vocational education program that provides on campus or off-campus housing to its nonhandicapped students must provide, at the same cost and under the same conditions, comparable convenient and accessible housing to handicapped students.

D. COMPARABLE FACILITIES

Recipients must provide changing rooms, showers, and other facilities for students of one sex that are comparable to those provided to students of the other sex. This may be accomplished by alternating use of the

same facilities or by providing separate, comparable facilities.

Such facilities must be adapted or modified to the extent necessary to make the vocational education program readily accessible to handicapped persons.

VII. WORK STUDY, COOPERATIVE VOCATIONAL EDUCATION, JOB PLACEMENT, AND APPRENTICE TRAINING

A. RESPONSIBILITIES IN COOPERATIVE VOCATIONAL EDUCATION PROGRAMS, WORK-STUDY PROGRAMS AND JOB PLACEMENT PROGRAMS

A recipient must insure that: (a) it does not discriminate against its students on the basis of race, color, national origin, sex, or handicap in making available opportunities in cooperative education, work study and job placement programs, and (b) students participating in cooperative education, work study and job placement programs are not discriminated against by employers or prospective employers on the basis of race, color, national origin, sex, or handicap in recruitment, hiring, placement, assignment to work tasks, hours of employment, levels of responsibility, and in pay.

If a recipient enters into a written agreement for the referral or assignment of students to an employer, the agreement must contain an assurance from the employer that students will be accepted and assigned to jobs and otherwise treated without regard to race, color, national origin, sex, or handicap.

Recipients may not honor any employer's request for students who are free of handicaps or for students of a particular race, color, national origin, or sex. In the event an employer or prospective employer is or has been subject to court action involving discrimination in employment, school officials should rely on the court's findings if the decision resolves the issue of whether the employer has engaged in unlawful discrimination.

B. APPRENTICE TRAINING PROGRAMS

A recipient may not enter into any agreement for the provision or support of apprentice training for students or union members with any labor union or other sponsor that discriminates against its members or applicants for membership on the basis of race, color, national origin, sex, or handicap. If a recipient enters into a written agreement with a labor union or other sponsor providing for apprentice training, the agreement must contain an assurance from the union or other sponsor: (1) that it does not engage in such discrimination against its membership or applicants for membership, and (2) that apprentice training will be offered and conducted for its membership free of such discrimination.

VIII. EMPLOYMENT OF FACULTY AND STAFF

A. EMPLOYMENT GENERALLY

Recipients may not engage in any employment practice that discriminates against any employee or applicant for employment on the basis of sex or handicap. Recipients may not engage in any employment practice that discriminates on the basis of race, color, or national origin if such discrimination tends to result in segregation, exclusion or other discrimination against students.

B RECRUITMENT

Recipients may not limit their recruitment for employees to schools, companies, or companies disproportionately composed of persons of a particular race, color, national origin, sex, or handicap except for the purpose of overcoming the effects of past discrimination. Every notice of faculty must be notified that the recipient does not discriminate in employment on the basis of race, color, national origin, sex, or handicap.

C. PATTERNS OF DISCRIMINATION

Whenever the Office for Civil Rights finds that in light of the representation of protected groups in the relevant labor market there is a significant underrepresentation or overrepresentation of protected group persons on the staff of a vocational education school or program, it will presume that the disproportion results from unlawful discrimination. This presumption can be overcome by proof that qualified persons of the particular race, color, national origin, or sex or that qualified handicapped persons are not in fact available in the relevant labor market.

D. SALARY POLICIES

Recipients must establish and maintain faculty salary scales and policy based upon the conditions and responsibilities of employment, without regard to race, color, national origin, sex, or handicap.

F. EMPLOYMENT OPPORTUNITIES FOR HANDICAPPED APPLICANTS

Recipients must provide equal employment opportunities for teaching and administrative positions to handicapped applicants who can perform the essential functions of the position in question. Recipients must make reasonable accommodation for the physical or mental limitations of handicapped applicants who are otherwise qualified unless recipients can demonstrate that the accommodation would impose an undue hardship.

F. THE EFFECTS OF PAST DISCRIMINATION

Recipients must take steps to overcome the effects of past discrimination in the recruitment, hiring, and assignment of faculty. Such steps may include the recruitment or reassignment of qualified persons of a particular race, national origin, or sex, or who are handicapped.

G. STAFF OF STATE ADVISORY COUNCILS OF VOCATIONAL EDUCATION

State Advisory Councils of Vocational Education are recipients of Federal financial assistance and therefore must comply with Section VIII of the Guidelines.

H. EMPLOYMENT AT STATE OPERATED VOCATIONAL EDUCATION CENTERS THROUGH STATE CIVIL SERVICE AUTHORITIES

Where recruitment and hiring of staff for State operated vocational education centers is conducted by a State civil service employment authority, the State education agency operating the program must insure that recruitment and hiring of staff for the vocational education center is conducted in accordance with the requirements of these Guidelines.

IX. PROPRIETARY VOCATIONAL EDUCATION SCHOOLS

A. RECIPIENT RESPONSIBILITIES

Proprietary vocational education schools that are recipients of Federal financial assistance through Federal student assistance programs or otherwise are subject to all of the requirements of the Department's regulations and these Guidelines.

B. ENFORCEMENT AUTHORITY

Enforcement of the provisions of Title IX of the Education Amendments of 1972 and Section 504 of the Rehabilitation Act of 1973 is the responsibility of the Department of Health, Education, and Welfare. However, authority to enforce Title VI of the Civil Rights Act of 1964 for proprietary vocational education schools has been delegated to the Veterans Administration.

When the Office for Civil Rights receives a Title VI complaint alleging discrimination by a proprietary vocational education school, it will forward the complaint to the Veterans Administration and cite the applicable requirements of the Department's regulations and these Guidelines. The complainant will be notified of such action.

PART 84—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

2. In 45 CFR Part 84 Appendix B is added to read as follows:

APPENDIX B GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

NOTE: For the text of these guidelines, see 45 CFR Part 80, Appendix B.

PART 86—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

3. In 45 CFR Part 86 Appendix A is added to read as follows:

APPENDIX A GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

NOTE: For the text of these guidelines, see 45 CFR Part 80, Appendix B.

DAVID S. TATEL,

Director, Office for Civil Rights,
Department of Health, Education,
and Welfare.

MARCH 15, 1979.

COMMENTS AND RECOMMENDATIONS

Over 130 comments and recommendations were received by the Office for Civil Rights in response to the December 19, 1978 publication of proposed Guidelines. (43 FR 59105) Many identified deficiencies that resulted in significant changes to the Guidelines. Each comment was carefully considered before a response was prepared. The following comments and responses are adopted by the Department as a part of the Guidelines.

Supplementary Information

SUPPLEMENTARY INFORMATION

1. *Comment:* Commenters stated that the Supplementary Information section was unfairly critical of vocational education administrators, relied too heavily on outdated and suspect data, and ignored the advances achieved under the Vocational Education Amendments of 1976.

Response: The objections have merit and changes have been made. The Supplementary Information section has been revised to include current data, to delete outdated and suspect data, to place greater emphasis on OCR investigations and compliance reviews and to acknowledge that vocational education administrators have responded to antidiscrimination measures of the Vocational Education Amendments of 1976.

SECTION I—SCOPE AND COVERAGE

2. *Comment:* Commenters recommended that paragraph I-A state with clarity that the Guidelines apply to all recipients of financial assistance from the Department of Health, Education, and Welfare and not merely to recipients of Federal vocational education funds.

Response: The recommendation is accepted and paragraph I-A has been modified.

3. *Comment:* One commenter suggested that OCR establish a single definition of "recipient" in its Title VI, Title IX and Section 504 regulations to the extent permitted by the underlying legislation.

Response: A single definition of "recipient" would be helpful. However, the change proposed is beyond the scope of the Guidelines project.

4. *Comment:* Commenters requested that the Guidelines state the responsibilities of recipients under the Age Discrimination Act of 1975.

Response: Regulations under the Age Discrimination Act have not yet been issued. The Guidelines will ultimately include coverage of age discrimination.

5. *Comment:* A commenter recommended that paragraph I-C include as an education agency providing vocational education, "the State Board of Vocational Education and/or a State board or body providing vocational education."

Response: Paragraph I A states that State agency recipients are covered by the Guidelines. Paragraph I C provides examples of recipients covered by the Guidelines and lists, at I-C(6),

a State agency . . . operating a vocational education facility."

6 *Comment.* Commenters requested that paragraph II-D(6) and (7) be amended to include "certificate programs."

Response. The suggested change has been adopted.

7. *Comment.* Commenters requested that paragraph I-D list as recipients vocational rehabilitation centers and residential centers.

Response. Paragraph I-D provides examples of covered schools. The Guidelines also apply to vocational rehabilitation centers and residential vocational education centers.

8 *Comment.* One commenter requested a definition of the term "subrecipient."

Response. The term "subrecipient" is defined in paragraph II-B.

SECTION II—RESPONSIBILITIES OF STATE AGENCIES

9. *Comment.* Commenters found paragraph II-B incomplete and vague.

Response. This objection has merit. The paragraph has been substantially revised to clarify State agency responsibilities. Definitions of technical assistance and of "compliance review" have been added (paragraph (B)(2) and (3)). The Guidelines now state that the Department, not the State agency, has the responsibility and authority to make formal fact findings and terminate and defer Federal funds.

While the additions to the final Guidelines answer several of the specific questions raised by the commenters much more needs to be done. Within 90 days, the Office for Civil Rights and the Bureau of Occupational and Adult Education will issue memoranda that provide the additional detail necessary for successful State agency compliance activity.

10 *Comment.* Commenters argued that paragraph II-B imposes new requirements on State agency recipients.

Response. State agencies, as well as other recipients of Federal financial assistance, are prohibited from conducting their programs through subrecipients or contractors that discriminate. See for example, 45 CFR Sections 80.3(b), 84.4(b)(4), 86.32(b)(d). The Title VI regulations clearly include a State agency obligation to adopt "method of administration" for monitoring subrecipient, for civil rights compliance. However, this requirement has not been enforced against State education agencies. The Department believes that this must be

corrected to be effective, civil rights compliance activity cannot in the exclusive province of Federal civil rights agencies, it must include Department program agencies (in this case the Bureau of Occupational and Adult Education) and State agencies.

11. *Comment.* Commenters argued that the requirements imposed on State agencies by paragraph II-B are unduly burdensome and costly.

Response. Subparagraph B(1) has been revised to insure that no significant additional data collection or record keeping requirement is imposed on recipients. In addition, the requirement that State agencies investigate complaints has been deleted. Civil rights enforcement, however, must be recognized as important enough to merit the allocation of necessary funds. Federal, State, and local funds and resources available for vocational education must be used for civil rights compliance activities in vocational education programs. The obligations imposed are therefore not unreasonably burdensome.

12. *Comment.* Commenters stated that OCR, through paragraph II-B, is assigning or delegating its enforcement responsibilities to the States.

Response. The Guidelines contemplate a cooperative effort among OCR, the Bureau of Occupational and Adult Education, and State agencies. Their purpose is to add, not substitute, resources for civil rights compliance activity. The Guidelines now clearly state what was always intended. The Office for Civil Rights will not decrease its compliance activity in vocational education programs.

13. *Comment.* Commenters stated that proposed paragraph II-D, which attempted to establish a clear division between State and local responsibilities, was confusing and inconsistent with other sections of the Guidelines. They asked that the paragraph be deleted. It was also suggested that the heading of Section II and the first sentence of paragraph II-A should state that the enumerated requirements are only one aspect of a State agency's responsibilities under the Guidelines.

Response. The suggested changes are adopted as consistent with the intent of the Guidelines.

SECTION III DISTRIBUTION OF FEDERAL FINANCIAL ASSISTANCE AND OTHER FUNDS FOR VOCATIONAL EDUCATION

14. *Comment.* Commenters argued that protected group persons must be provided "equal opportunity" not merely "opportunity" (paragraph III-A).

Response. This suggestion is accepted. The opportunity for vocational training must be equal for all students without regard to race, color, national origin, sex, or handicap. The provision

of unequal facilities, for example, cannot be excused because it is a less than total denial of opportunity.

15 *Comment.* Commenters questioned whether the purpose of proposed paragraph III-B was to prohibit discrimination in the development of a formula (input standard) or in the allocation of funds (output standard). The policy statement in proposed paragraph III-B controlled factors in the formula while the example cited in the paragraph was based on fund allocations.

Response. The Office for Civil Rights may review a formula's components. However, its primary inquiry will be whether the formula has a discriminatory effect on the allocation of funds. Accordingly, the first sentence in paragraph III-B has been rewritten to delete the reference to "factors."

16. *Comment.* Commenters suggested rephrasing paragraph III-B to permit the use of factors that remedy the effects of past discrimination. Others suggested that the Department uphold the use of indicia that enable the State to identify communities entitled to priority under the Vocational Education Act. For example, a State vocational education distribution formula may refer to the number of persons residing in a school district receiving aid to families with dependent children or with limited English speaking ability. The purpose of such a reference is to identify areas either economically depressed or with high concentrations of low-income people.

Response. The suggestions are accepted. Judicial precedent requires recipients to undertake affirmative or remedial action when directed by Congress or in response to a finding of past discrimination. In addition, the adoption of the recommended language confirms that a recipient's use of data on AFDC or LEISA populations to comply with the Vocational Education Act is consistent with civil rights authorities.

17. *Comment.* Commenters asked for an explanation of the second sentence in proposed paragraph III-B. State agencies must apply formula provisions under the Vocational Education Amendments of 1976 in a manner consistent with civil rights authorities. They believe that the statement suggests an inconsistency between civil rights authorities and the targeting provisions of the Vocational Education Act.

Response. The sentence does suggest a tension between the provisions of the Vocational Education Act and civil rights authorities. In fact, they are complementary. Paragraph III-B, as revised, contains the essential language prohibiting discrimination in the application of a formula. The chal

lenged sentence has therefore been deleted.

18. *Comment.* Commenters questioned whether the example used in proposed paragraph III-B (now in III-C) is intended to require equal per-pupil allocation of funds.

Response: Section 106(a)(5)(B)(ii) of the Vocational Education Act prohibits the adoption of a formula seeking equal per-pupil allocations of funds. Rather it requires priority funding for subrecipients serving the greatest concentrations of low income families, for subrecipients least able to pay, and for subrecipients serving the greatest concentrations of students whose education imposes higher than average costs (e.g., handicapped students, students from low-income families, and students from families in which English is not the dominant language). These statutory priorities should result in greater expenditures for communities with concentrations of minority group persons. For this reason the gauge of unlawful discrimination contained in the Guidelines—as finding of lower allocations for communities containing concentrations of minority persons—will generally indicate a high probability of noncompliance.

In addition to an analysis of allocations State-wide, OCR may examine individual districts, with substantial numbers of minority students to determine if such districts receive lower per-pupil allocations than the State wide average.

19. *Comment.* A funding formula will be presumed unlawfully discriminatory if the circumstances recorded in paragraph III-B (now paragraph III-C) are present. Commenters asked for examples of evidence that will rebut the presumption.

Response. Two examples of persuasive rebuttal evidence derive from the Vocational Education Act. First, under Section 106(a)(5)(A)(ii) a State must give priority to funding applications that propose programs new to a service area and that are designed to meet emerging or projected manpower needs and job opportunities. These priorities are not directly related to economic need. Therefore the application of these priorities may in some circumstances be used by a State agency to rebut the presumption of discrimination arising from an inadequate allocation of funds to recipients enrolling a disproportionately high percentage of minorities. Secondly, Section 106(a)(4) requires the distribution of Federal vocational education funds on the basis of annual applications. An eligible recipient that fails to submit an application is prohibited from receiving Federal funds. A similar requirement may control the allocation of State funds under the provisions of a State law. For this

reason, the failure of urban or other recipients to apply for funds must be considered before a finding of compliance or noncompliance can be made.

These are only examples of rebuttal evidence that will be considered. Each case must be decided on the basis of a careful analysis of all evidence believed relevant by the recipient and by the Office for Civil Rights.

20. *Comment.* Commenters asked whether the presumption of paragraph III-C will be applied to each type of vocational education program or to combined State allocations; whether Federal and State funds will be examined separately or in combination, whether both operating costs and capital expenditures will be examined; whether the distribution formula will be judged on an annual basis or over a period of years.

Response: Section 106(a)(5) of the Vocational Education Act requires the States to base the distribution of Federal funds on economic, social, and demographic factors relating to the need for vocational education. The Commissioner of Education has ruled in 42 F.R. 53865 (Question #1) that the State's funding formula under section 106(a)(5) must be applied to each of the following Vocational Education Act programs: basic grant (section 120), guidance and counseling (section 134), special programs for the disadvantaged (section 140), and consumer and homemaking programs (section 150). To insure consistency with Office of Education directives under the Vocational Education Act, the Guidelines requirements may be applied to each of the programs set out above.

The statutory factors listed in section 106(a)(5) of the Vocational Education Act apply to the distribution of Federal vocational education funds. A State may elect to distribute State funds under the same or a different formula. In any event, OCR may separately consider State and Federal allocations to determine whether each is consistent with civil rights authorities.

The distribution formula governs the allocation of all grants to subrecipients under Sections 120, 134, 140, and 150, including those for operating costs and capital expenditures. OCR may therefore examine both operating costs and capital expenditures.

States are required to describe the formula for the distribution of Federal funds in their five year plans (45 CFR 104.182(d)). In applying the gauge of unlawful discrimination to State formulas, OCR may consider expenditures for a single year, or for such other period it finds relevant to whether unlawful discrimination has occurred.

21. *Comment.* A commenter asked whether paragraph III B (now III B and III C) applies to local as well as

State agencies. Others asked whether the gauge of compliance, now recorded in paragraph III C, applies to local agencies.

Response: Paragraph III-B has been revised to clarify that it applies to all recipients that allocate Federal, State, or local funds among other recipients or schools. Thus, the paragraph applies to local agencies that employ a formula or "other method of allocation" to distribute funds among administrative subdistricts.

The gauge of compliance, recorded in paragraph III-C, refers to a potential misallocation of State and Federal funds. Although this gauge must prove in practice to be a convenient and informative measure, it will tentatively also be used to evaluate allocations of local funds.

22. *Comment:* State agencies argued they could not control the allocation of local funds.

Response: A State agency is not expected to provide protection against an improper allocation of local funds unless it has authority to review or approve local allocations.

23. *Comment:* Commenters argued that OCR lacks authority to monitor State vocational education funds. They argued that paragraph III B should only control the allocation of Federal funds.

Response: The Department has an obligation to provide protection against unlawful discrimination in any and all facets of a program funded in whole or in part with Federal funds. A recipient of Federal funds may not unlawfully discriminate in the allocation or use of such funds or in the allocation or use of any other funds under its control. Of course, as one commenter notes, if the Department finds it necessary to proceed against any recipient, it may only attempt to defer or terminate HEW Federal funds.

24. *Comment:* Commenters suggested that the phrase "available through Federal funds" (paragraph III-C now III-D), improperly suggests that civil rights authorities apply only to competitive grants or contracts paid for with Federal funds under the Vocational Education Act. They urged that the phrase be deleted.

Response: The suggestion is accepted. A State agency receiving Federal funds may not discriminate in the allocation or distribution of any funds under its control.

25. *Comment:* Commenters thought the example, now recorded in paragraph III C, should not be referred to in the paragraph relating to competitive grants and contracts.

Response: The example cannot be meaningfully applied to competitive grants and contracts. The reference has therefore been deleted.

26. *Comment.* Commenters suggested that paragraph III E (now III-F) state that in appropriate circumstances a State may be required to remedy the effects of a prior unlawfully discriminatory distribution of funds.

Response. The Comment is accepted. It is well established that a recipient must remedy past unlawful discrimination and provide protection against like discrimination in the future.

27. *Comment.* Commenters questioned whether paragraph III-E (now III-F) affects the Commissioner of Education's authority to approve or direct a change in the State's method of fund distribution.

Response. If a State system for distributing Federal vocational education funds violates civil rights authorities, the Office of Education and the Office for Civil Rights will jointly seek corrective action.

SECTION IV ACCESS AND ADMISSION OF STUDENTS

28. *Comment.* Commenters stated that the proposed Guidelines prohibited only future unlawful discrimination. They suggested a prohibition against recipients' maintaining unlawfully discriminatory practices.

Response. This suggestion is accepted. Recipients must eliminate the effects of past discrimination and ensure nondiscrimination in the future.

29. *Comment.* Commenters suggested that paragraph IV-B be amended to require that sites be accessible to handicapped persons.

Response. The requirement of program accessibility for mobility impaired persons is contained in paragraph IV-N.

30. *Comment.* Commenters argued that new sites should be "equally" accessible rather than "readily" accessible to minority students.

Response. It is generally impossible to find or judge sites "equally" accessible to minority and nonminority communities. Recipients should attempt to locate facilities in perfectly neutral sites, but no change in the Guidelines is required or appropriate.

31. *Comment.* Recipient commenters stated that they often do not have authority to select sites for new facilities.

Response. Recipients that do not have authority to select, review, or approve sites have no obligations under this provision.

32. *Comment.* Commenters objected to paragraph IV-C on the ground that it conflicts with State statutes that limit certain programs offered by a district to students residing within that district.

Response. As to laws that limit the admission of students to programs on the basis of residence within a district may be cited by recipients as proof of

nondiscrimination. The adequacy or accuracy of that claim will depend upon all of the facts and will vary from State to State and from case to case.

33. *Comment.* Commenters suggested that student reassignment is an additional remedy for site selection and geographic service area violations (proposed paragraph IV-D, now paragraph IV-E).

Response. This suggestion is accepted. For example, if high school vocational education programs are unlawfully segregated because of a geographic zone boundary, the segregation may be remedied through student reassignments.

34. *Comment.* Commenters thought the geographic zoning requirements for secondary vocational schools (paragraph IV-C) should be the same for postsecondary institutions (proposed paragraph IV-E).

Response. Geographic service area of attendance zone boundaries for vocational education centers are generally used at the secondary level. However, paragraph IV-C and IV-E apply to postsecondary institutions that limit admission on the basis of student residence. The separate paragraph for postsecondary institutions has therefore been deleted.

35. *Comment.* Generally, students may not attend an Area Vocational Education School (AVES) unless they reside within one of the school districts participating in the consortium. Commenters objected that paragraph IV-C will result in an unfair requirement that students from nonparticipating districts be admitted to the area school.

Response. In the event the "circumstances" listed in paragraph IV-C arise in a comparison between a consortium and a school district adjacent to a consortium, a recipient(s) may rebut the resulting presumption of unlawful discrimination through proof that compelling reasons justified the inclusion and exclusion of contiguous districts. For example, recipients may demonstrate that an excluded district failed to approve a bond issue needed for the construction of a facility and that all districts included in the consortium approved such a bond issue.

It will not be sufficient for the consortium to prove that all participating districts have approximately the same tax base and that they joined together for that reason. Rather a consortium must prove that an excluded district received a genuine invitation to participate on terms comparable to those offered any other district, and that the offer was declined by the governing authority of the district. If a recipient fails to prove that the planning and formation stages were nondiscriminatory, it will be required to give

the excluded district an opportunity to participate in the consortium. Of course, the newly included district may be required to contribute financially and otherwise on the basis of an equitable formula and arrangement.

36. *Comment.* Consortia ask whether paragraph IV-F bars an equal allocation of a facility's student capacity among participating school districts if that allocation results in the disproportionate exclusion of minority group students. Comment No. 35 addresses an issue illustrated by the exclusion of a city school system from an essentially suburban consortium. The issue in this comment is illustrated by a consortium of a majority black city school system and four majority white suburban districts that equally share a vocational education facility with a capacity of 500 students. Inequality results from this agreement if the city system's student enrollment is substantially greater than its suburban partners. Thus if each participant in this five district consortium is allocated 100 student spaces in the vocational education center, each suburban district may have only 1,000 students competing for 100 spaces while the city system may have 2,000 students competing for 100 spaces. Students in the city system do not have equal opportunity for admission to the vocational education center.

Response. This provision (IV-F) applies to both separate school districts and consortia. However, a consortium may allocate available spaces in the manner described in this comment if it proves that compelling reasons similar to those discussed in comment 35 above, justify the allocation.

37. *Comment.* Commenters asked whether paragraph IV-C may result in a requirement that a school district admit to its vocational education facilities students who reside in an entirely separate school district.

Response. Paragraph IV-C and IV-F apply primarily to discrimination within a school district and to consortia as discussed in comments 35 and 36. A legally constituted separate school district providing vocational education only to students residing within its borders is not required by paragraph IV-C to admit nonresident students. However, in the event a State establishes a "vocational education district" composed of several school districts, the boundaries of the vocational education district are subject to review under paragraph IV-C.

38. *Comment.* Commenters objected that paragraph IV-H was unreasonable and unrealistic in presuming that segregated facilities, courses and programs resulted from recipient practices rather than student choice. Others urged that the paragraph contain an additional specific presump-

tion of unlawful discrimination if a school were established for members of one race, sex or national origin and continues to be so attended. Such commenters asked for a rule holding that the only permissible remedy for segregation in such a school is relocation of courses and programs to other schools.

Response: Both commenters have some merit and have led to a rewriting of the paragraph. Vocational education administrators are quite correct in arguing that specific vocational courses and programs are generally elected by, not required of, students. Consequently, segregation may result from parental, community and peer group influences that are beyond their control. This fact is generally recognized by Section IV of the Guidelines; each paragraph identifies a method or factor controlling student eligibility other than student choice and attempts to provide protection against the unlawful exclusion of students based upon that factor. Thus, a student's ineligibility based upon residence (paragraph IV C) or because the facility was located too far from his or her home (paragraph IV B) or because he or she scored too low on an admissions test (paragraph IV-K) is addressed by the Guidelines. Proposed paragraph IV H departed from this theme. Rather than identify a specific device that resulted in the exclusion of students despite their desire to enroll, the paragraph proposed a presumption of unlawful discrimination whenever a facility or course was segregated. This was unreasonable, and the general presumption has been deleted.

However, the other commenters are also correct in stating that the Guidelines fail to identify another factor or device that can interfere with a student's choice. A recipient may have constructed a facility for members of one race or sex and may not have taken meaningful action to remedy the segregation. In such cases, it is unreasonable to state that the school continues to be segregated as a result of student choice. The analogy to racial segregation in elementary and secondary public schools is perfect by the late 1960's Federal courts were consistently holding that school officials were not adequately desegregating their dual racial systems when, after 100 years of enforced segregation, they merely opened the doors of their white schools and announced that black students could apply for admission. Paragraph IV H has accordingly been rewritten to hold that if a facility was established for minorities, or for one race, national origin or sex and it continues to be essentially segregated despite open enrollment, additional steps to desegregate the facility are necessary. However, the suggestion that a specific remedy should be re-

quired of a school established as a segregated facility, is not accepted. The efficacy of any proposed remedy will vary from case to case.

39. *Comment:* Commenters stated that there should not be a violation of paragraph IV H if a protected group is represented in a facility in proportion to its representation in the service area.

Response: This comment is accepted. Evidence that members of a protected group attend a facility in proportion to their representation in the service area will be accepted as evidence of that group's nondiscriminatory enrollment in the facility. However, the boundaries of the service area must satisfy the requirements of paragraph IV C.

40. *Comment:* Commenters suggested that in paragraph IV H underrepresentation, not nonparticipation, should be the standard, that discrimination based on national origin was improperly omitted from paragraphs IV F and IV-H.

Response: These suggestions merely urge consistency among several provisions and identify inadvertent errors. The suggested changes have been made.

41. *Comment:* Commenters urged that handicapped persons be protected by paragraph IV-H.

Response: A vocational education center, branch or annex enrolling only handicapped students is often permissible under the Department's Section 504 regulation (e.g. a school for autistic children). Each secondary level student must be individually evaluated and then assigned to a program responsive to his or her individual needs. For this reason the presumption recognized in paragraph IV H cannot routinely protect handicapped persons. Nevertheless, under the requirements of paragraphs IV N and VI A, secondary level handicapped students may be placed in segregated annexes, branches or centers only if their individualized education plans state that they cannot be trained in a regular program with supplementary aids and services.

42. *Comment:* Commenters suggested that the proposed validation standard of paragraph IV-K would permit recipients to use criteria that disproportionately exclude minorities or handicapped persons merely by demonstrating that the students admitted were more likely to succeed in the program. This would allow recipients, for example, to exclude protected persons from the attractive trade and technical programs through evidence that a "C" average student is less likely to excel in a program than an "A" average student. The commenters suggested that screening criteria to be permis-

sible, must be "essential to participation" in a program.

Response: This suggestion is accepted. One of the principal objectives of the Vocational Education Act is to provide protected group persons the training they need to obtain employment. Screening criteria or standards that have the effect of disproportionately excluding such persons from vocational education programs must therefore be validated as essential to satisfactory completion of course requirements. The use of criteria like grade point average, to justify priority admission of students with exceptional attainments or scores may disproportionately exclude protected group persons. If such disproportionate exclusion occurs the criteria or standards must be validated as essential to participation in a program before they may be used by a recipient.

43. *Comment:* Commenters sought to expand paragraphs IV L and IV M. They argued that recipients should be required to provide native language programs, English language instruction and other diverse methods of instruction where there are high concentrations of persons with limited English language skills.

Response: The changes proposed are beyond the scope of the Guidelines project. The requirements of the Guidelines are consistent with established Office for Civil Rights secondary school policy.

44. *Comment:* Commenters objected to the failure of paragraph IV D, (L) and (M) (now E, L and M) to include deadlines for the submission of acceptable remedial plans.

Response: The Office for Civil Rights will establish time periods for the submission of remedial plans on a case by case basis.

45. *Comment:* Commenters thought the public notification paragraph, IV O, fails to ensure adequate notice of vocational education opportunities. Others thought the proposed provision was too burdensome, they found the requirement of notice to limited English proficiency persons particularly objectionable.

Response: The requirement that recipients announce a policy of nondiscrimination has several components: 1) the notice must be continuing; 2) it must be designed to reach a recipient's beneficiaries and employees, and potential beneficiaries and employees, particularly members of protected groups; 3) it must state the policy of nondiscrimination; 4) it must include the name, telephone number, and address of a person who can provide additional information on the policy of nondiscrimination. The proposed provision for notification was deficient with respect to requirement number 4.

the final Guidelines have been revised accordingly.

The Department agrees with the commenters who found too onerous the requirement of notice of "all program offerings and admissions criteria." It has been substantially revised. Also, notice to national origin minorities with limited English speaking ability is now required only if a service area contains a "community" of such persons.

46. *Comment:* Commenters asked whether affirmative action programs were permissible or required.

Response: Appropriate remedial action (sometimes referred to as "affirmative action") must be undertaken to overcome the effects of past discrimination. Also certain voluntary affirmative action measures are permissible under the Department's Title VI, Title IX, and Section 504 regulations, when a recipient finds such measures useful or necessary to correct societal discrimination or patterns of segregation and nonparticipation. The Secretary and the President have issued statements urging recipients to adopt and continue voluntary affirmative action programs in admissions, recruitment, counseling, and employment.

47. *Comment:* A commenter asked whether children attending private racially discriminatory academies may also attend Federally assisted vocational schools.

Response: On April 26, 1976, the Office for Civil Rights announced that "children enrolled in a non-public school cannot participate in the public school program if the non-public school engaged in discriminatory practices prohibited by Title VI. Even though the non-public school is not a recipient, any discriminatory practices by it would . . . directly affect the Federally assisted program." 41 F.R. 35520 (August 23, 1976).

SECTION V - COUNSELING AND PRE-VOCATIONAL PROGRAMS

48. *Comment:* Commenters recommended that recipients be required to provide inservice training for counselors on the needs of minorities, the handicapped, and students stereotyped on the basis of sex.

Response: Inservice training is an approved method for instructing professional staff on the forms of discrimination experienced by students. However, recipients may obtain compliance through other methods.

49. *Comment:* Proposed paragraph V-B provided that disproportionate enrollments based on sex must be examined to verify that they do not result from discrimination in counseling. Commenters asked that disproportionate enrollments based on race or national origin lead to a similar examination of counseling practices.

Response: The suggestion is accepted and paragraph V-B has been revised.

50. *Comment:* Commenters urged that paragraph V-E endorse affirmative promotional and outreach activities.

Response: The recommendation is accepted. Voluntary affirmative action in promotional and counseling activities is endorsed through comment number 47.

51. *Comment:* Commenters found "unrealistic" the prohibition against counseling handicapped students toward limited career objectives (paragraph V-B).

Response: This provision allows a recipient to advise handicapped students of the difficulties they may encounter in fields not traditionally opened to them. However, the provision requires that recipients do more than merely state that such obstacles exist. The recipient must provide students with information on available vocational opportunities, on the responsibilities of an employer under Section 504, and on available remedies in the event of discrimination. Information or materials that may assist recipients in meeting this responsibility are available from the Office for Civil Rights, Office of Program and Review and Assistance.

SECTION VI - EQUAL OPPORTUNITY IN THE VOCATIONAL EDUCATION INSTRUCTIONAL SETTING

52. *Comment:* Commenter recommended several changes to this section: A) "Mainstreaming" handicapped students should not be a priority; B) Sex restricted financial assistance, even subject to the conditions specified in paragraph VI-B, should be impermissible; C) Additional detail should be provided in paragraph VI-C to provide protection against unlawful discrimination; D) A new section should be added to announce recipient obligations to national origin minority persons with limited English speaking ability.

Response: The primary purpose of Section VI of the Guidelines is to record several provisions of the Department's Title IX and Section 504 regulations that deserve emphasis in light of findings in OCR compliance reviews and complaint investigations. Proposed changes "A" and "B" are inconsistent with the Department's regulations and therefore beyond the scope of the Guidelines project; suggestion "C" is needless in that it seeks to regulate recipients aimlessly; proposed change "D" seeks a provision already included in another section of the Guidelines.

SECTION VII - WORK STUDY, COOPERATIVE VOCATIONAL EDUCATION, JOB PLACEMENT, AND APPRENTICE TRAINING

53. *Comment:* Commenters argued that the requirements of Section VII are too burdensome. They believe that Congress never intended recipients to monitor employers and unions for discrimination.

Response: Vocational education administrators misperceive the nature of Section VII requirements. Under the Department's civil rights regulations recipients are prohibited from engaging in any service, activity, or program in a discriminatory manner. Work study, cooperative education, and job placement are recipient programs or activities and for this reason may not be marred by unlawful discrimination. There is evidence, for example, that school officials are honoring requests from employers for persons of a particular race or sex or for persons free of handicaps. This is unlawful discrimination by both the recipient and the employer. Moreover, the Congress is not mindless; it does not enact idle legislation. It would not appropriate more than a half billion dollars annually under the Vocational Education Act for both nondiscriminatory job training programs and discriminatory job placement programs.

54. *Comment:* Commenters suggested that the Guidelines require recipients to obtain an assurance of nondiscrimination from employers that participate in cooperative education, work study, and job placement programs. Others suggested that paragraph VII-A should require school officials to collect, review, and maintain data reflecting the race, sex, national origin, and handicap of students participating in these programs.

Response: The addition of a written assurance to existing written agreements (e.g., cooperative vocational education agreements) is a reasonable and useful measure. This requirement has been added to the Guidelines. To date, OCR investigators have not been frustrated by inadequate recipient records, and the data collection suggestion is therefore not accepted.

55. *Comment:* Commenters urged that paragraph VII be rewritten to allow potential employers to discriminate on the basis of handicap if the handicap prevents a person from performing the job. One commenter stated, for example, that a roofing company need not hire an individual with no legs as a roofer since the job requires an ability to climb a ladder carrying 90 pounds of materials.

Response: Employers may not discriminate on the basis of handicap against otherwise qualified handicapped persons. Prospective employers are permitted to make preemployment

Inquiries into an applicant's ability to perform job-related functions. Note, however, that employers are required to "reasonably accommodate" the special needs of a handicapped employee or applicant for employment if it does not result in an "undue hardship" for the employer. In the example provided by the commenter a small roofing concern would probably be unduly burdened by the accommodation necessary for this handicapped person. However, in contrast, a major university will not experience "undue hardship"; it provides a reader for a blind applicant for employment. See paragraph VIII E of the Guidelines. Additional information on the principles of "undue hardship" and "reasonable accommodation" can be obtained from the Office for Civil Rights, Office of Program Review and Assistance.

56. *Comment:* Commenters objected to the phrasing in paragraph VII A suggesting that a recipient must control an employer's policies and practices.

Response: A recipient cannot control the policies or practices of an employer. However, a recipient must determine whether an employer discriminates and if necessary divorce itself-its programs and activities--from the discriminating employer.

57. *Comment:* Commenters asked whether recipients are prohibited from entering work study and cooperative education agreements with employers that have remedied their discriminatory policies and practices.

Response: Recipients are free to enter into agreements with such employers.

58. *Comment:* A commenter argued that prospective employers in cooperative placement activities should not be covered by these Guidelines because they are "ultimate beneficiaries" under 45 CFR § 84.3(f).

Response: The requirements of the Guidelines apply to recipients of Federal funds, not to prospective employers. Recipients must take measures to free their programs and activities of employers who unlawfully discriminate. It is unnecessary, therefore, to determine whether prospective employers are "ultimate beneficiaries."

59. *Comment:* Commenters asked whether the requirement of nondiscrimination in apprentice training applies only to programs sponsored by unions.

Response: Paragraph VII B applies to registered and non-registered apprentice training programs whether sponsored by a union, an individual employer, a group of employees, an employer-employee committee, or a governmental agency. The text of paragraph VII B has therefore been revised to cover a "labor union or other sponsor." Also, all sponsors of apprentice programs are subject to the Department of Labor Guidelines for Nondiscrimination in All Apprentice-ship Programs (29 CFR Part 30).

SECTION VIII - EMPLOYMENT OF FACULTY AND STAFF

60. *Comment:* Commenters argued that the Department's Title VI employment jurisdiction extends only to employees who work directly with students. They state that the Department has no authority to act on complaints of employment discrimination against "administrators or applicants for employment."

Response: The Guidelines have been revised to reflect the Department's current interpretation of its authority. If and when it is revised or modified, the new policy will be announced and will supersede the Guidelines.

61. *Comment:* Commenters stated that the Department has no authority to accept or resolve employment discrimination complaints under Title IX.

Response: The Guidelines reflect the Department's current interpretation of its authority. Several cases raising this issue are now pending in the courts of appeal. If and when this litigation results in controlling holdings that the Department has no employment jurisdiction under Title IX, the Department's regulations and these Guidelines will be revised.

62. *Comment:* Commenters suggested that under a recent decision of the United States Court of Appeals for the Fourth Circuit, *Tracy v. Libbie Rehabilitation Center*, - F.2d - (4th Cir. 1978), the Department has no authority to accept or resolve employment discrimination complaints under Section 504.

Response: The Guidelines reflect the Department's current interpretation of its authority. If and when it must be revised to conform to controlling judicial decisions, the new policy will be announced and will supersede the Guidelines.

63. *Comment:* Commenters stated that the definition of a "qualified handicapped" person under Section 504 of the Rehabilitation Act and the Guidelines is at odds with the Department of Labor's definition under Section 503 of the Rehabilitation Act.

Response: The Department of HEW is presently reviewing with the Department of Labor the inconsistencies between their definitions. The Guidelines reflect the Department's current view. If and when it is revised or modified, the Department's regulation and these Guidelines will be revised.

64. *Comment:* Commenters objected to paragraph VIII F on the ground that it establishes requirements inconsistent with *Bakke*.

Response: The Guidelines require remedial action to overcome the effects of past discrimination. *Bakke* permits, among other activities, such "affirmative action."

65. *Comment:* Commenters objected to paragraph VIII-C as "presuming guilt" before an investigation is conducted.

Response: Although alternative language was considered, no change has been made in the Guideline. It is not the intention nor the effect of the Guidelines to make baseless presumptions or findings. Rather, statistical patterns result in inferences that additional evidence may rebut. The Office for Civil Rights will not find unlawful discrimination solely on the basis of statistical data or without affording a recipient an opportunity for rebuttal.

66. *Comment:* Commenters urged that the Guidelines require recipients to maintain and submit data on its employment practices.

Response: This suggestion was rejected. Records maintained and submitted by recipients under other authorities have satisfied the needs of OCR investigators.

67. *Comment:* Commenters asked whether this section applies to State agencies.

Response: All recipients of Federal financial assistance from the Department, as specified in Section I, are covered by Section VIII. This also explains the requirement of paragraph II A(4).

68. *Comment:* Commenter stated that paragraph VIII C should recognize that a recipient may rebut a presumption of unlawful employment discrimination through evidence that qualified persons of a protected group were not available to the individual school district nor to the vocational education center.

Response: Rebuttal evidence may include proof that: (1) Members of a protected group were recruited without success; or (2) Identified persons of a protected group were offered employment opportunities that were declined.

SECTION IX—PROPRIETARY VOCATIONAL EDUCATION SCHOOLS

69. *Comment:* A commenter argued that a tuition grant or loan to a student in attendance at a proprietary school is not Federal financial assistance to the proprietary school. Rather it is compensation paid for a direct service—a "procurement contract." It is argued that proprietary schools are therefore not subject to the Department's regulations or these Guidelines.

Response: The Department has long defined the term "recipient" under Title VI, Title IX and Section 504 to include proprietary (i.e., other than public or nonprofit) educational institutions that receive tuition from students participating in Federal tuition grant programs. It is beyond the scope of the Guidelines project to reconsider established Department policy.

DAVID S. TATEL,
Director,
Office for Civil Rights

March 15, 1979.

(FR Doc. 79-8561 Filed 3-20-79; 8:45 am)

7

DEVELOPMENTALLY DISABLED ASSISTANCE
AND BILL OF RIGHTS ACT

42 U.S.C. §§6000 et. seq.

309

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HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other Provisions:

Change of name. For change of name of the Department of Health, Education, and Welfare to the Department of Health and Human Services, see 20 USCS § 3508 and notes.

Revocation of Ex. Or. No. 11973. Ex. Or. No. 11973 of Feb. 17, 1977, 42 Fed. Reg. 10677, classified as a note to this section, was revoked by Ex. Or. No. 12110 of Dec. 28, 1978, 44 Fed. Reg. 1069, effective 12/31/78. It related to the President's Commission on Mental Health.

GENERAL PROVISIONS

§ 6000. Findings and purpose

(a) The Congress finds that—

- (1) there are more than two million persons with developmental disabilities in the United States;
- (2) individuals with disabilities occurring during their developmental period are more vulnerable and less able to reach an independent level of existence than other handicapped individuals who generally have had a normal developmental period on which to draw during the rehabilitation process;
- (3) persons with developmental disabilities often require specialized lifelong services to be provided by many agencies in a coordinated manner in order to meet the persons' needs;
- (4) general service agencies and agencies providing specialized services to disabled persons tend to overlook or exclude persons with developmental disabilities in their planning and delivery of services; and
- (5) it is in the national interest to strengthen specific programs, especially programs that reduce or eliminate the need for institutional care, to meet the needs of persons with developmental disabilities.

(b)(1) It is the overall purpose of this title to assist States to assure that persons with developmental disabilities receive the care, treatment, and other services necessary to enable them to achieve their maximum potential through a system which coordinates, monitors, plans, and evaluates those services and which ensures the protection of the legal and human rights of persons with developmental disabilities.

(2) The specific purposes of this title are—

(A) to assist in the provision of comprehensive services to persons with developmental disabilities, with priority to those persons whose needs cannot be covered or otherwise met under the Education for All Handicapped Children Act [20 USCS §§ 1401 et seq.], the Rehabilitation Act of 1973 [29 USCS §§ 701 et seq.], or other health, education, or welfare programs;

(B) to assist States in appropriate planning activities;

(C) to make grants to States and public and private, nonprofit agencies to establish model programs, to demonstrate innovative habilitation techniques, and to train professional and paraprofessional personnel with respect to providing services to persons with developmental disabilities;

(D) to make grants to university affiliated facilities to assist them in administering and operating demonstration facilities for the provision of services to persons with developmental disabilities, and interdisciplinary training programs for personnel needed to provide specialized services for these persons; and

(E) to make grants to support a system in each State to protect the legal and human rights of all persons with developmental disabilities.

(Oct. 31, 1963, P. L. 88-164, Title I, Part A, § 101, as added Nov. 6, 1978, P. L. 95-602, Title V, § 502, 92 Stat. 3004.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

References in text:

"This title", referred to in this section, is Title I of Act Oct. 31, 1963, P. L. 88-164, and appears generally as 42 USCS §§ 6000 et seq.; for full classification, consult USCS Tables volumes.

Explanatory notes:

A prior § 101 of Act Oct. 31, 1963 (Act Oct. 31, 1963, P. L. 88-164, Title I, Part A, § 101, as added Oct. 4, 1975, P. L. 94-103, Title I, Part E, § 125, 89 Stat. 496), which was classified as a note to 42 USCS § 6001, was struck out by Act Nov. 6, 1978, P. L. 95-602, Title V, § 502, 92 Stat. 3003.

Short titles:

Act Oct. 31, 1963, P. L. 88-164, Title I, Part A, § 100, as added Nov. 6, 1978, E. L. 95-602, Title V, § 502, 92 Stat. 3003, provided:

"This title may be cited as the 'Developmental Disabilities Assistance and Bill of Rights Act'." For full classification of this Title, consult USCS Tables volumes.

Other provisions:

Applicability and effective date of 1978 Act. Act Nov. 6, 1978, P. L. 95-602, Title V, § 515, 92 Stat. 3017, provided:

"The amendments made by this title shall apply to payments under title I of the Mental Retardation Facilities and Community Mental Health Centers Construction Act for fiscal years beginning on and after October 1, 1978." For full classification of these Titles, consult USCS Tables volumes.

§ 6001. Definitions.

For purposes of this title [42 USCS §§ 6001 et seq.]:

(1) The term "State" includes Puerto Rico, Guam, the Northern Mariana Islands, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the District of Columbia.

(2) The term "facility for persons with developmental disabilities" means a facility, or a specified portion of a facility, designed primarily for the delivery of one or more services to persons with one or more developmental disabilities.

(3) The terms "nonprofit facility for persons with developmental disabilities" and "nonprofit private institution of higher learning" mean, respectively, a facility for persons with developmental disabilities and an institution of higher learning which are owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual; and the term "nonprofit private agency or organization" means an agency or organization which is such a corporation or association or which is owned and operated by one or more of such corporations or associations.

(4) The term "construction" includes construction of new buildings, acquisition, expansion, remodeling, and alteration of existing buildings, and initial equipment of any such buildings (including medical transportation facilities); including architect's fees, but excluding the cost of offsite improvements and the cost of the acquisition of land.

(5) The term "cost of construction" means the amount found by the Secretary to be necessary for the construction of a project.

(6) The term "title", when used with reference to a site for a project, means a fee simple, or such other estate or interest (including a leasehold on which the rental does not exceed 4 per centum of the value of the land) as the Secretary finds sufficient to assure for a period of not less than fifty years undisturbed use and possession for the purposes of construction and operation of the project.

(7) The term "developmental disability" means a severe, chronic disability of a person which—

- (A) is attributable to a mental or physical impairment or combination of mental and physical impairments;
- (B) is manifested before the person attains age twenty-two;
- (C) is likely to continue indefinitely;
- (D) results in substantial functional limitations in three or more of the

following areas of major life activity: (i) self-care, (ii) receptive and expressive language, (iii) learning, (iv) mobility, (v) self-direction, (vi) capacity for independent living, and (vii) economic self-sufficiency; and

(E) reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.

(8)(A) The term "services for persons with developmental disabilities" means priority services (as defined in subparagraph (B)), and any other specialized services or special adaptations of generic services for persons with developmental disabilities, including in these services the diagnosis, evaluation, treatment, personal care, day care, domiciliary care, special living arrangements, training, education, sheltered employment, recreation, counseling of the individual with such disability and of his family, protective and other social and socio-legal services, information and referral services, follow-along services, and transportation services necessary to assure delivery of services to persons with developmental disabilities.

(B) The term "priority services" means case management services (as defined in subparagraph (C)), child development services (as defined in subparagraph (D)), alternative community living arrangement services (as defined in subparagraph (E)), and nonvocational social-developmental services (as defined in subparagraph (F)).

(C) The term "case management services" means such services to persons with developmental disabilities as will assist them in gaining access to needed social, medical, educational, and other services; and such term includes—

(i) follow-along services which ensure, through a continuing relationship, lifelong if necessary, between an agency or provider and a person with a developmental disability and the persons's immediate relatives or guardians, that the changing needs of the person and the family are recognized and appropriately met; and

(ii) coordination services which provide to persons with developmental disabilities support, access to (and coordination of) other services, information on programs and services, and monitoring of the persons' progress.

(D) The term "child development services" means such services as will assist in the prevention, identification, and alleviation of developmental disabilities in children, and includes (i) early intervention services, (ii) counseling and training of parents, (iii) early identification of developmental disabilities, and (iv) diagnosis and evaluation of such developmental disabilities.

(E) The term "alternative community living arrangement services" means such services as will assist persons with developmental disabilities in maintaining suitable residential arrangements in the community, and includes in-house services (such as personal aides and attendants and other domestic assistance and supportive services), family support services, foster care services, group living services, respite care, and staff training, placement, and maintenance services.

(F) The term "nonvocational social-developmental services" means such services as will assist persons with developmental disabilities in performing daily living and work activities.

(9) The term "satellite center" means an entity which is affiliated with one or more university affiliated facilities and which functions as a community or regional extension of such university affiliated facility or facilities in the delivery of services to persons with developmental disabilities, and their families, who reside in geographical areas where adequate services are not otherwise available.

(10) The term "university affiliated facility" means a public or nonprofit facility which is associated with, or is an integral part of, a college or university and which provides for at least the following activities:

(A) Interdisciplinary training for personnel concerned with developmental disabilities.

(B) Demonstration of the provision of exemplary services relating to persons with developmental disabilities.

(C)(i) Dissemination of findings relating to the provision of services to persons with developmental disabilities, and (ii) providing researchers and government agencies sponsoring service-related research with information on the needs for further service-related research.

(11) The term "Secretary" means the Secretary of Health, Education, and Welfare.

(Oct. 31, 1963, P. L. 88-164, Title I, Part A, § 102, as added Oct. 4, 1975, P. L. 94-103, Title I, Part E, § 125, 89 Stat. 496.)

(12) The term "State Planning Council" means a State Planning Council established under section 137 [42 USCS § 6067].

(As amended Nov. 6, 1978, P. L. 95-602, Title V, § 503(a), (b)(1), (c)-(f), 92 Stat. 3004, 3005.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Short titles:

Act Oct. 4, 1975, P. L. 94-103 § 1, 89 Stat. 486, provided: "This Act [Generally, it appears as 42 USCS §§ 6001 et seq. For full classification of this Act, consult USCS Tables volumes.] may be cited as the 'Developmentally Disabled Assistance and Bill of Rights Act'."

Act Oct. 31, 1963, P. L. 88-164, Title I, Part A, § 101, as added Oct. 4, 1975, P. L. 94-103, Title I, Part E, § 125, 89 Stat. 496, provided: "This title [Generally, it appears as 42 USCS §§ 6001 et seq. For full classification of this Act, consult USCS Tables volumes.] may be cited as the 'Developmental Disabilities Services and Facilities Construction Act'."

Effective dates:

Act Oct. 4, 1975, P. L. 94-103, Title III, § 303, 89 Stat. 507, provided: "The amendments made by this Act [42 USCS §§ 6001 et seq.] shall take effect with respect to appropriations under the Act [42 USCS §§ 6001 et seq.] for fiscal years beginning after June 30, 1975."

Explanatory notes:

Part A of Title I of Act Oct. 31, 1963, cited to text in the history to this section, formerly amended Title VII of the Public Health Service Act [42 USCS §§ 201 et seq.] and was classified to 42 USCS §§ 295 et seq.

Other provisions:

Report and study, Act Oct. 4, 1975, P. L. 94-103, Title III, § 301, 89 Stat. 505; Apr. 22, 1976, P. L. 94-278, Title XI, § 1107(d), 90 Stat. 416, provided: "(a) The Secretary of Health, Education, and Welfare (hereinafter in this section referred to as the 'Secretary') shall, in accordance with section 102(7) of the Act [subsec. (7) of this section] (defining the term 'developmental disability') (as amended by title I of this Act [amendment to this section]), determine the conditions of persons which should be included as developmental disabilities for purposes of the programs authorized by title I of the Act [42 USCS §§ 6001 et seq.]. Within six months of the date of enactment of this Act [enacted Oct. 4, 1975] the Secretary shall make such determination and shall make a report thereon to the Congress specifying the conditions which he determined should be so included, the conditions which he determined should not be so included, and the reasons for each such determination. After making such report, the Secretary shall

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periodically, but not less often than annually, review the conditions not so included as developmental disabilities to determine if they should be so included. The Secretary shall report to the Congress the results of each such review.

(b)(1) The Secretary shall contract for the conduct of an independent objective study to determine (A) if the basis of the definition of the developmental disabilities (as amended by title I of this Act [amendment to this section]) with respect to which assistance is authorized under such title is appropriate and, to the extent that it is not, to determine an appropriate basis for determining which disabilities should be included and which disabilities should be excluded from the definition, and (B) the nature and adequacy of services provided under other Federal programs for persons with disabilities not included in such definition.

(2) A final report giving the results of the study required by paragraph (1) and providing specifications for the definition of developmental disabilities for purposes of title I of the Act [42 USCS §§ 6001 et seq.] shall be submitted by the organization conducting the study to the Committee on Inter-State and Foreign Commerce of the House of Representatives and the Committee on Labor and Public Welfare of the Senate not later than eighteen months after the date of enactment of this Act [enacted Oct. 4, 1975].

Fiscal year transition. Act Apr. 21, 1976, P. L. 94-274, Title I, § 107, 90 Stat. 387, provided: "For the purposes of the Developmental Disabilities Services and Facilities Construction Act (42 U.S.C. 6001 et seq.) [42 USCS §§ 6001 et seq.] (1) the term 'fiscal year' includes the period of July 1, 1976, through September 30, 1976, (2) for purposes of paragraphs (3) and (4) of section 132(a) of that Act (42 U.S.C. 6062(a)(3) and (4)) [42 USCS § 6062(a)(3) and (4)] that period shall be considered part of the fiscal year beginning July 1, 1975; and (3) the minimum allotment of the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands for that period under section 132(a)(1) of that Act (42 U.S.C. 6062(a)(1)) [42 USCS § 6062(a)(1)] shall be \$12,500 and the minimum allotment of each State for that period shall be \$37,500."

Amendments:

1978. Act Nov. 6, 1978, in para. (1), added "the Northern Mariana Islands," substituted paras. (7)-(10) as they appear above, exclusive of subsequent amendment, for those paragraphs as they appear in the bound volume; and added para. (12).

Short titles:

Act Oct. 31, 1963, P. L. 88-164, Title I, Part A, § 101, as added Oct. 4, 1975, P. L. 94-103, Title I, Part E, § 125, 89 Stat. 496; formerly classified as a short title note to this section, was struck out by Act Nov. 6, 1978, P. L. 95-602, Title V, § 502, 92 Stat. 3003. For the effective date of this deletion, see § 515 of Act Nov. 6, 1978, set out as a note to 42 USCS § 6000.

Other provisions:

Change of name. For change of name of the Department of Health, Education, and Welfare to the Department of Health and Human Services, see 20 USCS § 3508 and notes.

Applicability and effective date of 1978 amendments. For the applicability and effective date of the amendments made by Act Nov. 6, 1978, see § 515 of that Act, set out as a note to 42 USCS § 6000.

Report to Congress on 1978 amendment. Act Nov. 6, 1978, P. L. 95-602, Title V, § 503(b)(2), 92 Stat. 3005, provided:

"(2) The Secretary of Health, Education, and Welfare shall submit to Congress, not later than January 15, 1981, a special report concerning the impact of the amendment of the definition of 'developmentally disabled' made by paragraph (1). This report shall include—

"(A) an analysis of the impact of the amendment on each of the categories of persons with developmental disabilities receiving services under the Developmental Disabilities Assistance and Bill of Rights Act [42 USCS §§ 600 et seq.] before the date of enactment of this Act [enacted Nov. 6, 1978], and for the fiscal year ending on September 30, 1979 and for the succeeding fiscal year, including—

"(i) the number of persons with developmental disabilities in each category served before and after such date of enactment [enacted Nov. 6, 1978]; and

"(ii) the amounts expended under such Act [42 USCS §§ 6000 et seq.] for each such category of persons with developmental disabilities before and after such date of enactment [enacted Nov. 6, 1978]; and

"(B) an assessment, evaluation, and comparison of services provided to persons with developmental disabilities provided before the date of enactment of this Act [enacted Nov. 6, 1978] and for the fiscal year ending September 30, 1979 and for the succeeding fiscal year."

INTERPRETIVE NOTES AND DECISIONS

In enacting Developmentally Disabled Assistance and Bill of Rights Act, Congress has in effect declared its intention that plans to improve conditions of mentally retarded be limited to one federal agency, Department of Health, Education and Welfare, rather than to allow wholesale attacks by

Justice Department on state's mental retardation programs under guise of protecting Thirteenth and Fourteenth Amendments of Constitution. *United States v Solomon* (1976, DC Md) 419 F.Supp 358, *aff'd* (CA4 Md) 563 F.2d 1121.

§ 6002. Federal share

(a) The Federal share of any project to be provided through grants under part B [42 USCS §§ 6031 et seq., 6041 et seq.] and allotments under part C [42 USCS §§ 6061 et seq.] may not exceed 75 per centum of the necessary cost thereof as determined by the Secretary, except that if the project is located in an urban or rural poverty area, the Federal share may not exceed 90 per centum of the project's necessary costs as so determined.

(b) The non-Federal share of the cost of any project assisted by a grant or allotment under this title [42 USCS §§ 6001 et seq.] may be provided in kind.

(c) For the purpose of determining the Federal share with respect to any project, expenditures on that project by a political subdivision of a State or by a nonprofit private entity shall, subject to such limitations and conditions the Secretary may by regulation prescribe, be deemed to be expenditures by such State in the case of a project under part C [42 USCS §§ 6061 et seq.] or by a university-affiliated facility or a satellite center, as the case may be, in the case of a project assisted under part B [42 USCS §§ 6031 et seq., 6041 et seq.].

(Oct. 31, 1963, P. L. 88-164, Title I, Part A, § 103, as added Oct. 4, 1975, P. L. 94-103, Title I, Part E, § 125, 89 Stat. 498.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective dates:

Act Oct. 4, 1975, P. L. 94-103, Title III, § 303, 89 Stat. 507, provided: "The amendments made by this Act [42 USCS §§ 6001 et seq.] shall take effect with respect to appropriations under the Act [42 USCS §§ 6001 et seq.] for fiscal years beginning after June 30, 1975."

Explanatory notes:

Part A of Title I of Act Oct. 31, 1963, in the history to this section, formerly amended Title VII of the Public Health Service Act [42 USCS §§ 201 et seq.] and was classified to 42 USCS §§ 295 et seq.

§ 6003. State control of operations

Except as otherwise specifically provided, nothing in this title [42 USCS §§ 6001 et seq.] shall be construed as conferring on any Federal officer or employee the right to exercise any supervision or control over the adminis-

tration, personnel, maintenance, or operation of any facility for persons with developmental disabilities with respect to which any funds have been or may be expended under this title [42 USCS §§ 6001 et seq.].

(Oct. 31, 1963, P. L. 88-164, Title I, Part A, § 104, as added Oct. 4, 1975, P. L. 94-103, Title I, Part E, § 125, 89 Stat. 498.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective dates:

Act Oct. 4, 1975, P. L. 94-103, Title III, § 303, 89 Stat. 507, provided: "The amendments made by this Act [42 USCS §§ 6001 et seq.] shall take effect with respect to appropriations under the Act [42 USCS §§ 6001 et seq.] for fiscal years beginning after June 30, 1975."

Explanatory notes:

Part A of Title I of Act Oct. 31, 1963, in the history to this section, formerly amended Title VII of the Public Health Service Act [42 USCS §§ 201 et seq.] and was classified to 42 USCS §§ 295 et seq.

§ 6004. Records and audit

(a) Each recipient of assistance under this title [42 USCS §§ 6001 et seq.] shall keep such records as the Secretary shall prescribe, including (1) records which fully disclose (A) the amount and disposition by such recipient of the proceeds of such assistance, (B) the total cost of the project or undertaking in connection with which such assistance is given or used, and (C) the amount of that portion of the cost of the project or undertaking supplied by other sources, and (2) such other records as will facilitate an effective audit.

(b) The Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access for the purpose of audit and examination to any books, documents, papers, and records of the recipients of assistance under this title [42 USCS §§ 6001 et seq.] that are pertinent to such assistance.

(Oct. 31, 1963, P. L. 88-164, Title I, Part A, § 105, as added Oct. 4, 1975, P. L. 94-103, Title I, Part E, § 125, 89 Stat. 498.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective dates:

Act Oct. 4, 1975, P. L. 94-103, Title III, § 303, 89 Stat. 507, provided: "The amendments made by this Act [42 USCS §§ 6001 et seq.] shall take effect with respect to appropriations under the Act [42 USCS §§ 6001 et seq.] for fiscal years beginning after June 30, 1975."

Explanatory notes:

Part A of Title I of Act Oct. 31, 1963, in the history to this section, formerly amended Title VII of the Public Health Service Act [42 USCS §§ 201 et seq.] and was classified to 42 USCS §§ 295 et seq.

§ 6005. Employment of handicapped individuals

As a condition of providing assistance under this title [42 USCS §§ 6001 et seq.], the Secretary shall require that each recipient of such assistance take affirmative action to employ and advance in employment qualified handicapped individuals on the same terms and conditions required with respect to the employment of such individuals by the provisions of the Rehabilitation Act of 1973 [29 USCS §§ 701 et seq.] which govern employment (1) by State rehabilitation agencies and rehabilitation facilities, and (2) under Federal contracts and subcontracts.

(Oct. 31, 1963, P. L. 88-164, Title I, Part A, § 106, as added Oct. 4, 1975, P. L. 94-103, Title I, Part E, § 125, 89 Stat. 498.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES**Effective dates:**

Act Oct. 4, 1975, P. L. 94-103, Title III, § 303, 89 Stat. 507, provided: "The amendments made by this Act [42 USCS §§ 6001 et seq.] shall take effect with respect to appropriations under the Act [42 USCS §§ 6001 et seq.] for fiscal years beginning after June 30, 1975."

Explanatory notes:

Part A of Title I of Act Oct. 31, 1963, in the history to this section, formerly amended Title VII of the Public Health Service Act [42 USCS §§ 201 et seq.] and was classified to 42 USCS §§ 295 et seq.

§ 6006. Recovery

If any facility with respect to which funds have been paid under part B [42 USCS §§ 6031 et seq., 6041 et seq.] or C [42 USCS §§ 6061 et seq.] shall, at any time within twenty years after the completion of construction—

- (1) be sold or transferred to any person, agency, or organization which is not a public or nonprofit private entity, or
- (2) cease to be a public or other nonprofit facility for persons with developmental disabilities,

the United States shall be entitled to recover from either the transferor or the transferee (or, in the case of a facility which has ceased to be a public or other nonprofit facility for persons with developmental disabilities, from the owners thereof) an amount bearing the same ratio to the then value (as determined by the agreement of the parties or by action brought in the district court of the United States for the district in which the facility is situated) of so much of such facility as constituted an approved project or projects, as the amount of the Federal participation bore to the cost of the construction of such project or projects. Such right of recovery shall not constitute a lien upon such facility prior to judgment. The Secretary, in accordance with regulations prescribed by him, may, upon finding good cause therefor, release the applicant or other owner from the obligation to

continue such facility as a public or other nonprofit facility for persons with developmental disabilities.

(Oct. 31, 1963, P. L. 88-164, Title I, Part A, § 107, as added Oct. 4, 1975, P. L. 94-103, Title I, Part E, § 125, 89 Stat. 499.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

Effective dates:

Act Oct. 4, 1975, P. L. 94-103, Title III, § 303, 89 Stat. 507, provided: "The amendments made by this Act [42 USCS §§ 6001 et seq.] shall take effect with respect to appropriations under the Act [42 USCS §§ 6001 et seq.] for fiscal years beginning after June 30, 1975."

Explanatory notes:

Part A of Title I of Act Oct. 31, 1963, in the history to this section, formerly amended Title VII of the Public Health Service Act [42 USCS §§ 201 et seq.] and was classified to 42 USCS §§ 295 et seq.

§ 6007. [Repealed]

HISTORY: ANCILLARY LAWS AND DIRECTIVES

This section (Act Oct. 31, 1963, P. L. 88-164, Title I, Part A[C], § 108[133], 77 Stat. 227; Oct. 30, 1970, P. L. 91-517, Title I, § 101(b), 84 Stat. 1318; Oct. 4, 1975, P. L. 94-103, Title I, Part E, § 126(a), 89 Stat. 499) was repealed by Act Nov. 6, 1978, P. L. 95-602, Title V, § 504(a), 92 Stat. 3006. For the effective date and applicability of this repeal, see § 515 of Act Nov. 6, 1978, set out as a note to 42 USCS § 6000.

§ 6008. Promulgation of regulations

The Secretary, not later than 180 days after the date of enactment of any Act amending the provisions of this title, shall promulgate such regulations as may be required for the implementation of such amendments.

(As amended Nov. 6, 1978, P. L. 95-602, Title V, § 505, 92 Stat. 3007.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

Amendments:

1975, Act Oct. 4, 1975, in subsec. (a), (b), and (c), substituted "part C" for "this part" redesignated paragraphs (a)-(d), as paragraphs (1)-(4), respectively; and substituted the second and third sentences for one which read: "After appointment of the Council, regulations and revisions therein shall be promulgated by the Secretary only after consultation with Council."

Effective dates:

Section 103 of Act Oct. 30, 1970, provided that this section "shall apply with respect to fiscal years beginning after June 30, 1970", and further provided that funds appropriated before June 30, 1970, under 42 USCS former §§ 2671-2677, "shall remain available for obligation during the fiscal year ending June 30, 1971"

Act Oct. 4, 1975, P. L. 94-103, Title III, § 303, 89 Stat. 507, provided: "The amendments made by this Act [42 USCS §§ 6001 et seq.] shall take effect with respect to appropriations under the Act [42 USCS §§ 6001 et seq.] for fiscal years beginning after June 30, 1975."

Redesignation:

Act Oct. 4, 1975, § 127, redesignated this section, former § 139 of Act Oct. 31, 1963, to be § 109 of Act Oct. 31, 1963.

Explanatory notes:

This section was formerly classified to 42 USCS § 2677b.

Section 139 of Act of Oct. 31, 1963, was transferred from Part C to Part A of the Act of Oct. 31, 1963, by § 127 of Act of Oct. 4, 1975

GENERAL PROVISIONS

Amendments:

1978. Act Nov. 6, 1978, substituted this section as it appears above (exclusive of subsequent amendment) for the section as it appears in the bound volume.

Other provisions:

Applicability and effective date of 1978 amendments. For the applicability and effective date of the amendments made by Act Nov. 6, 1978, see § 515 of that Act, set out as a note to 42 USCS § 6000.

§ 6009. Evaluation system

(a) The Secretary shall develop, not later than October 1, 1979, a comprehensive system for the evaluation of services provided to persons with developmental disabilities through programs (including residential and nonresidential programs) assisted under this title [42 USCS §§ 6000 et seq.]. The Secretary shall require, as a condition to a State's receipt of assistance on and after October 1, 1980, under this title [42 USCS §§ 6000 et seq.], that the State submit to the Secretary, in such form and manner as he shall prescribe, a time-phased plan for the implementation of such a system. The Secretary shall require, as a condition to a State's receipt of assistance on and after October 1, 1982, under this title [42 USCS §§ 6000 et seq.], that the State provide assurances satisfactory to the Secretary that the State is using such a system.

(b) The evaluation system to be developed under subsection (a) shall—

- (1) provide objective measures of the developmental progress of persons with developmental disabilities using data obtained from individualized habilitation plans as required under section 112 [42 USCS § 6011] or other comparable individual data;
- (2) provide a method of evaluating programs providing services for persons with developmental disabilities which method uses the measures referred to in paragraph (1); and
- (3) provide effective measures to protect the confidentiality of records of, and information describing, persons with developmental disabilities.

(c) Upon development of the evaluation system described in subsection (b), the Secretary shall submit to Congress a report on the system, which report shall include an estimate of the costs to the Federal Government and the States of developing and implementing such a system.

(d) [Repealed]

(As amended Nov. 6, 1978, P. L. 95-602, Title V, §§ 504(b)(1), 506, 92 Stat. 3006, 3007; July 10, 1979, P. L. 96-32, § 3(b), 93 Stat 82.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective dates:

Act Oct. 4, 1975, P. L. 94-103, Title III, § 303, 89 Stat. 507, provided: "The amendments made by this Act [42 USCS §§ 6001 et seq.] shall take effect with respect to appropriations under the Act [42 USCS §§ 6001 et seq.] for fiscal years beginning after June 30, 1975."

Amendments:

1978. Act Nov. 6, 1978, as amended by Act July 10, 1979 (see 1979 amendment note below), substituted this section as it appears above (exclusive of subsequent amendment) for the section as it appears in the bound volume.

1979. Act July 10, 1979, amended § 506(a)(3) of amending Act Nov. 6, 1978, thereby clarifying the substitution of "a State's receipt of assistance on and after October 1, 1980, under this title, that the State" for "the receipt of assistance under this title, that such State" in subsec. (a) of this section.

Other provisions:

Applicability and effective date of 1978 amendments. For the applicability and effective date of the amendments made by Act Nov. 6, 1978, see § 515 of that Act, set out as a note to 42 USCS § 6000.

§ 6010. Rights of the developmentally disabled

Congress makes the following findings respecting the rights of persons with developmental disabilities:

(1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.

(2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.

(3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institutional or other residential program for persons with developmental disabilities that—

(A) does not provide treatment, services, and habilitation which is appropriate to the needs of such persons; or

(B) does not meet the following minimum standards:

(i) Provision of a nourishing, well-balanced daily diet to the persons with developmental disabilities being served by the program.

(ii) Provision to such persons of appropriate and sufficient medical and dental services.

(iii) Prohibition of the use of physical restraint on such persons unless absolutely necessary and prohibition of the use of such restraint as a punishment or as a substitute for a habilitation program.

(iv) Prohibition on the excessive use of chemical restraints on such persons and the use of such restraints as punishment or as a substitute for a habilitation program or in quantities that interfere with services, treatment, or habilitation for such persons.

(v) Permission for close relatives of such persons to visit them at reasonable hours without prior notice.

(vi) Compliance with adequate fire and safety standards as may be promulgated by the Secretary.

(4) All programs for persons with developmental disabilities should meet standards which are designed to assure the most favorable possible outcome for those served, and—

(A) in the case of residential programs serving persons in need of comprehensive health-related, habilitative, or rehabilitative services, which are at least equivalent to those standards applicable to intermediate care facilities for the mentally retarded promulgated in regulations of the Secretary on January 17, 1974 (39 Fed. Reg. pt. II), as appropriate when taking into account the size of the institutions and the service delivery arrangements of the facilities of the programs;

(B) in the case of other residential programs for persons with developmental disabilities, which assure that care is appropriate to the needs of the persons being served by such programs, assure that the persons admitted to facilities of such programs are persons whose needs can be met through services provided by such facilities, and assure that the facilities under such programs provide for the humane care of the residents of the facilities, are sanitary, and protect their rights; and

(C) in the case of nonresidential programs, which assure the care provided by such programs is appropriate to the persons served by the programs.

The rights of persons with developmental disabilities described in findings made in this section are in addition to any constitutional or other rights otherwise afforded to all persons.

(Oct. 31, 1963, P. L. 88-164, Title I, Part A, § 111, as added Oct. 4, 1975, P. L. 94-103, Title II, § 201, 89 Stat. 502.)

(As amended Nov. 6, 1978, P. L. 95-602, Title V, § 507, 92 Stat. 3007.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective dates:

Act Oct. 4, 1975, P. L. 94-103, Title III, § 303, 89 Stat. 507, provided: "The amendments made by this Act [42 USCS §§ 6001 et seq.] shall take effect with respect to appropriations under the Act [42 USCS §§ 6001 et seq.] for fiscal years beginning after June 30, 1975."

Other provisions:

Studies and recommendations. Act Oct. 4, 1975, P. L. 94-103, Title II, § 204, 89 Stat. 504, provided: "(a) The Secretary of Health, Education, and Welfare (hereinafter in this section referred to as the 'Secretary') shall conduct or arrange for the conduct of the following:

(1) A review and evaluation of the standards and quality assurance mechanisms applicable to residential facilities and community agencies under the Rehabilitation Act of 1973 [29 USCS §§ 701 et seq.], titles I and VI of the Elementary and Secondary Education Act of 1965 [20 USCS §§ 241 et seq. and former §§ 871 et seq.], titles XVIII, XIX, and XX of the Social Security Act [42 USCS §§ 1395 et seq., 1396 et seq., 1397 et seq.], and any other Federal law administered by the Secretary. Such standards and mechanisms shall be reviewed and evaluated (A) for their effectiveness in assuring the rights, described in section 111 of the Act [this section], of persons with developmental disabilities, (B) for their effectiveness in insuring that services rendered by such facilities and agencies to persons with developmental disabilities are consistent with current concepts of quality care concerning treatment, services, and habilitation of such persons, (C) for conflicting requirements, and (D) for the relative effectiveness of their enforcement and the degree and extent of their effectiveness.

(2) The development of recommendations for standards and quality assurance mechanisms (including enforcement mechanisms) for residential facilities and community agencies providing treatment, services, or habilitation for persons with developmental disabilities which standards and mechanisms will assure the rights stated in section 111 of the Act [this section]. Such recommendations shall be based upon performance criteria for measuring and evaluating the developmental progress of persons with developmental disabilities which criteria are consistent with criteria used in the evaluation system developed under section 110 of the Act [42 USCS § 6009].

(3) The development of recommendations for changes in Federal law and regulations administered by the Secretary after taking into account the review and evaluation under paragraph (1) and the recommended standards or mechanisms developed under paragraph (2).

"(b)(1) The Secretary may in consultation with the National Advisory Council on Services and Facilities for the Developmentally Disabled, obtain (through grants or contracts) the assistance of public and private entities in carrying out subsection (a).

(2) In carrying out subsection (a), the Secretary shall consult with appropriate public and private entities and individuals for the purpose of receiving their expert assistance, advice, and recommendations. Such agencies and individuals shall include persons with developmental disabilities, representative of such individuals, the appropriate councils of the Joint Commission on Accreditation of Hospitals, providers of health care, and State agencies. Persons to be consulted shall include the following officers of the Department of Health, Education, and Welfare: The Commissioner of the Medical

Services Administration, the Commissioner of the Rehabilitation Services Administration, the Deputy Commissioner of the Bureau of Education for the Handicapped, the Assistant Secretary for Human Development, the Commissioner of the Community Services Administration, and the Commissioner of the Social Security Administration.

"(c) The Secretary shall within eighteen months after the date of enactment of this Act [enacted Oct. 4, 1975] complete the review and evaluation and development of recommendations prescribed by subsection (a) and shall make a report to the Committee on Labor and Public Welfare of the Senate and the Committee on Interstate and Foreign Commerce of the House of Representatives on such review and evaluation and recommendations."

Amendments:

1978. Act Nov. 6, 1978, added "The rights of persons with developmental disabilities described in findings made in this section are in addition to any constitutional or other rights otherwise afforded to all persons."

Other provisions:

Change of name. For change of name of the Department of Health, Education, and Welfare to the Department of Health and Human Services, see 20 USCS § 3508 and notes.

Applicability and effective date of 1978 amendments. For the applicability and effective date of the amendments made by Act Nov. 6, 1978, see § 515 of that Act, set out as a note to 42 USCS § 6000.

§ 6011. Habilitation plans

(a) The Secretary shall require as a condition to a State's receiving an allotment under part C [42 USCS §§ 6061 et seq.] that the State provide the Secretary satisfactory assurances that each program (including programs of any agency, facility, or project) which receives funds from the State's allotment under such part (1) has in effect for each developmentally disabled person who receives services from or under the program a habilitation plan meeting the requirements of subsection (b), and (2) provides for an annual review, in accordance with subsection (c), of each such plan.

(b) A habilitation plan for a person with developmental disabilities shall meet the following requirements:

(1) The plan shall be in writing.

(2) The plan shall be developed jointly by (A) a representative or representatives of the program primarily responsible for delivering or coordinating the delivery of services to the person for whom the plan is established, (B) such person, and (C) where appropriate, such person's parents or guardian or other representative.

(3) The plan shall contain a statement of the long-term habilitation goals for the person and the intermediate habilitation objectives relating to the attainments of such goals. Such objectives shall be stated specifically and in sequence and shall be expressed in behavioral or other terms that provide measurable indices of progress. The plan shall (A) describe how the objectives will be achieved and the barriers that might interfere with the achievement of them, (B) state objective criteria and an evaluation procedure and schedule for determining whether such objectives and goals are being achieved, and (C) provide for a program coordinator who will be responsible for the implementation of the plan.

- (4) The plan shall contain a statement (in readily understandable form) of specific habilitation services to be provided, shall identify each agency which will deliver such services, shall describe the personnel (and their qualifications) necessary for the provision of such services, and shall specify the date of the initiation of each service to be provided and the anticipated duration of each such service.
- (5) The plan shall specify the role and objectives of all parties to the implementation of the plan.
- (c) Each habilitation plan shall be reviewed at least annually by the agency primarily responsible for the delivery of services to the person for whom the plan was established or responsible for the coordination of the delivery of services to such person. In the course of the review, such person and the person's parents or guardian or other representative shall be given an opportunity to review such plan and to participate in its revision.
- (Oct. 31, 1963, P. L. 88-164, Title I, Part A, § 112, as added Oct. 4, 1975, P. L. 94-103, Title II, § 202, 89 Stat. 503.)
- (As amended Nov. 6, 1978, P. L. 95-602, Title V, § 514(a), 92 Stat. 3106.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective dates:

Act Oct. 4, 1975, P. L. 94-103, Title III, § 303, 89 Stat. 507, provided: "The amendments made by this Act [42 USCS §§ 6001 et seq.] shall take effect with respect to appropriations under the Act [42 USCS §§ 6001 et seq.] for fiscal years beginning after June 30, 1975."

Amendments:

1978. Act Nov. 6, 1978, in subsec. (a), deleted "after September 30, 1976," after "part C"; and, in subsec. (b)(3), substituted "The" for "Such" and deleted "an" before "objective criteria".

Other provisions:

Applicability and effective date of 1978 amendments. For the applicability and effective date of the amendments made by Act Nov. 6, 1978, see § 515 of that Act, set out as a note to 42 USCS § 6000.

§ 6012. Protection and advocacy of individual rights

(a) In order for a State to receive an allotment under part C [42 USCS §§ 6061 et seq.], (1) the State must have in effect a system to protect and advocate the rights of persons with developmental disabilities, (2) such system must (A) have the authority to pursue legal, administrative, and other appropriate remedies to insure the protection of the rights of such persons who are receiving treatment, services, or habilitation within the State, (B) not be administered by the State Planning Council, and (C) be independent of any agency which provides treatment, services, or habilitation to persons with developmental disabilities, and (3) the State must submit to the Secretary in a form prescribed by the Secretary in regulations (A) a report, not less often than once every three years, describing the system, and (B) an annual report describing the activities carried out under the system and any changes made in the system during the previous year.

(b)(1)(A) To assist States in meeting the requirements of subsection (a), the Secretary shall allot to the States the sums appropriated under paragraph (2). Allotments and reallocations of such sums shall be made on the same basis as the allotments and reallocations are made under the first sentence of subsections (a)(1) and (d) of section 132 [42 USCS § 6062 (a)(1), (d)], except that no State (other than Guam, the Northern Mariana Islands, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands) in any fiscal year shall be allotted an amount under this subparagraph which is less than the greater of \$50,000 or the amount of the allotment to the State under this paragraph for the previous fiscal year.

(B) Notwithstanding subparagraph (A), if the aggregate of the amounts of the allotments for grants to be made in accordance with such subparagraph for any fiscal year exceeds the total of the amounts appropriated for such

allotments under paragraph (2), the amount of a State's allotment for such fiscal year shall bear the same ratio to the amount otherwise determined under such subparagraph as the total of the amounts appropriated for that year under paragraph (2) bears to the aggregate amount required to make an allotment to each of the States in accordance with subparagraph (A).

(2) For allotments under paragraph (1), there are authorized to be appropriated \$3,000,000 for fiscal year 1976, \$5,000,000 for fiscal year 1977, and \$3,000,000 for fiscal year 1978, \$9,000,000 for the fiscal year ending September 30, 1979, \$12,000,000 for the fiscal year ending September 30, 1980, and \$15,000,000 for the fiscal year ending September 30, 1981. The provisions of section 1913 of title 18, United States Code [18 USCS § 1913], shall be applicable to all moneys authorized under the provisions of this section.

(As amended Nov. 6, 1978, P. L. 95-602, Title V, § 508, 92 Stat. 3008.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective dates:

Act Oct. 4, 1975, P. L. 94-103, Title III, § 303, 89 Stat. 507, provided: "The amendments made by this Act [42 USCS §§ 6001 et seq.] shall take effect with respect to appropriations under the Act [42 USCS §§ 6001 et seq.] for fiscal years beginning after June 30, 1975."

Amendments:

1978. Act Nov. 6, 1978, substituted this section as it appears above (exclusive of subsequent amendment) for the section as it appears in the bound volume.

Other provisions:

Applicability and effective date of 1978 amendments. For the applicability and effective date of the amendments made by Act Nov. 6, 1978, see § 515 of that Act, set out as a note to 42 USCS § 6000.

§ 6031. Grant authority

(a) From appropriations under section 123 [42 USCS § 6033], the Secretary shall make grants to university affiliated facilities to assist in the administration and operation of the activities described in section 102(10) [42 USCS § 6001(10)].

(b) The Secretary may make one or more grants to a university affiliated facility receiving a grant under subsection (a) to support one or more of the following activities:

(1) Conducting a feasibility study of the ways in which it, singly or jointly with other university affiliated facilities which have received a grant under subsection (a), can establish and operate one or more satellite centers which would be located in areas not served by a university affiliated facility. Such a study shall be carried out in consultation with the State Planning Council for the State in which the facility is located and where the satellite center would be established.

(2) Assessing the need for trained personnel in providing assistance to persons with developmental disabilities.

(3) Provision of service-related training to practitioners providing services to persons with developmental disabilities.

(4) Conducting an applied research program designed to produce more efficient and effective methods (A) for the delivery of services to persons with developmental disabilities, and (B) for the training of professionals, paraprofessionals, and parents who provide these services.

The amount of a grant under paragraph (1) may not exceed \$25,000.

(c) The Secretary may make grants to pay part of the costs of establishing satellite centers and may make grants to satellite centers to pay part of their administration and operation costs. The Secretary may approve an application for a grant under this subsection only if the feasibility of establishing or operating the satellite center for which the grant is applied for has been established by a study assisted under this section.

(As amended Nov. 6, 1978, P. L. 95-602, Title V, § 509, 92 Stat. 3008.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Short titles:

Section 1 of Act Oct. 31, 1963, provided: "This Act [Generally, it appears as 42 USCS §§ 295 et seq. For full classification of this Act, consult USCS Tables volumes.] may be cited as the 'Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963'."

Section 1 of Act Dec. 4, 1967, provided: "This Act [42 USCS former §§ 2661 et seq.] may be cited as the 'Mental Retardation Amendments of 1967'."

Amendments:

1967. Act Dec. 4, 1967, substituted section for former section, which read: "For the purpose of assisting in the construction of clinical facilities providing, as nearly as practicable, a full range of inpatient and outpatient services for the mentally retarded and facilities which will aid in demonstrating provision of specialized services for the diagnosis and treatment, education, training, or care of the mentally retarded or in the clinical training of physicians and other specialized personnel needed for research, diagnosis and treatment, education, training, or care of the mentally retarded, there are authorized to be appropriated \$5,000,000 for the fiscal year ending June 30, 1964, \$7,500,000 for the fiscal year ending June 30, 1965, and \$10,000,000 each for the fiscal year ending June 30, 1966, and the fiscal year ending June 30, 1967. The sums so appropriated shall be used for project grants for construction of public and other nonprofit facilities for the mentally retarded which are associated with a college or university."

1970. Act Oct. 30, 1970, substituted subsec. (a) for former subsec. (a), which read: "(a) For the purpose of assisting in the construction (and the planning for the construction) of clinical facilities providing, as nearly as practicable, a full range of inpatient and outpatient services for the mentally retarded (which, for purposes of this part, includes other neurological handicapping conditions found by the Secretary to be sufficiently related to mental retardation to warrant inclusion in this part) and facilities which will aid in demonstrating provision of specialized services for the diagnosis and treatment, education, training, or care of the mentally retarded or in the clinical training of physicians and other specialized personnel needed for research, diagnosis and treatment, education, training, or care of the mentally retarded, including research incidental or related to any of the foregoing activities, there are authorized to be appropriated \$5,000,000 for the fiscal year ending June 30, 1964, \$7,500,000 for the fiscal year ending June 30, 1965, \$10,000,000 each for the fiscal year ending June 30, 1966, the fiscal year ending June 30, 1967, and the fiscal year ending June 30, 1968, and \$20,000,000 each for the fiscal year ending June 30, 1969, and the fiscal year ending June 30, 1970. Except as provided in subsection (b), the sums so appropriated shall be used for project grants for construction of public and other nonprofit facilities for the mentally retarded which are associated with a college or university."

1975. Act Oct. 4, 1975, substituted this section for former section which read: "(a) For the purpose of assisting in the construction (and the planning for the construction) of facilities which will aid in demonstrating provision of specialized services for the diagnosis and treatment, education, training, or care of the persons with developmental disabilities, or in the interdisciplinary training of physicians and other specialized personnel needed for research, diagnosis and treatment, education, training, or care of the persons with developmental

disabilities, including research incidental or related to any of the foregoing activities, there are authorized to be appropriated \$5,000,000 for the fiscal year ending June 30, 1964, \$7,500,000 for the fiscal year ending June 30, 1965, \$10,000,000 each for the fiscal year ending June 30, 1966, the fiscal year ending June 30, 1967, and the fiscal year ending June 30, 1968, and \$20,000,000 for each of the next five fiscal years through the fiscal year ending June 30, 1973. Except as provided in subsection (b), the sums so appropriated shall be used for project grants for construction of public and other non-profit facilities for the persons with developmental disabilities which are associated with a college or university.

"(b)(1) Of the sums appropriated pursuant to subsection (a) for any fiscal year, beginning with the fiscal year ending June 30, 1968, an amount equal to 2 per centum thereof (or such smaller amount as the Secretary may determine to be appropriate) shall be available to the Secretary for the purpose of making grants to cover not to exceed 75 per centum of the costs of the planning of projects with respect to the construction of which applications for grants may be made under this part. Not more than \$25,000 shall be granted under this subsection with respect to any project.

(2) Planning grants under this subsection shall be made by the Secretary to such applicants and upon such terms and conditions as he shall by regulations prescribe. Payment of grants under this subsection shall be made in advance or by way of reimbursement, as the Secretary may determine.

(3) Whenever, in the succeeding provisions of this part, the term 'grant,' 'grants,' or 'funds' is employed, such term shall be deemed not to include any grant under this subsection or any of the funds of any such grant.

1978. Act Nov. 6, 1978, substituted this section as it appears above (exclusive of subsequent amendment) for the section as it appears in the bound volume.

Effective dates:

Act Oct. 4, 1975, P. L. 94-103, Title III, § 303, 89 Stat. 507, provided: "The amendments made by this Act [42 USCS §§ 6001 et seq.] shall take effect with respect to appropriations under the Act [42 USCS §§ 6001 et seq.] for fiscal years beginning after June 30, 1975."

Explanatory notes:

This section was formerly classified to 42 USCS § 2661.

Other provisions:

President's Committee on Mental Retardation. Ex. Or. No. 11280, 31 Fed. Reg. 7167, of May 16, 1966, provided:

"Section 1. Committee established. There is hereby established the President's Committee on Mental Retardation (hereinafter referred to as the Committee).

"Sec. 2. Composition of Committee. The Committee shall be composed of the following members:

"(1) The Secretary of Health, Education, and Welfare, who shall be the Chairman of the Committee.

"(2) The Secretary of Labor.

"(3) The Director of the Office of Economic Opportunity.

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"(4) Not more than twenty-one other members who shall be appointed by the President from public or private life and may include specialists in medicine and other healing arts, human development, special education and employment problems, and members of foundations and other private organizations active in the mental retardation field. Except as the President may from time to time otherwise direct, appointees under this paragraph shall have terms as follows: (A) Of the members first appointed hereunder, the terms of seven shall expire on the first anniversary of the date of this Order, the terms of seven shall expire on the second anniversary, and the terms of seven shall expire on the third anniversary. (B) The term of each succeeding appointment shall expire on the third anniversary of the expiration of the predecessor term, except that an appointment made to fill a vacancy occurring before the expiration of a term shall be made for the balance of the unexpired term.

"Sec. 3. Functions of the Committee. (a) The Committee shall provide such advice and assistance in the area of mental retardation as the President may from time to time request, including assistance with respect to:

"(1) evaluation of the adequacy of the national effort to combat mental retardation;

"(2) coordination of activities of Federal agencies in the mental retardation field;

"(3) provision of adequate liaison between such Federal activities and related activities of State and local governments, foundations, and other private organizations; and

"(4) development of such information, designed for dissemination to the general public, as will tend to reduce the incidence of mental retardation and ameliorate its effects.

"(b) The Committee shall mobilize support for mental retardation activities by meeting with, and providing information for, appropriate professional organizations and groups broadly representative of the general public.

"(c) The Committee shall make such reports or recommendations to the President concerning mental retardation as he may require or the Committee may deem appropriate. Such reports shall be made at least once annually.

"Sec. 4. Cooperation with the Committee. All who may be in a position to do so are requested to furnish the Committee information pertinent to its work and otherwise to facilitate the work of the Committee.

"Sec. 5. Administrative arrangements. (a) As may be necessary, each Federal agency which is represented on the Committee shall furnish assistance to the Committee in accordance with the provisions of Section 214 of the Act of May 3, 1945 (59 Stat. 134; 31 U.S.C. 691) [31 USCS § 691], or as otherwise permitted by law. The Committee may have an Executive Director who shall be designated and compensated in consonance with law. The Department of Health, Education, and Welfare is hereby designated as the agency which principally shall

provide the Committee with necessary administrative services and facilities.

"(b) Each member of the Committee, except any member who then receives other compensation from the United States, shall receive compensation for each day he or she is engaged upon the work of the Committee, as authorized by law (5 U.S.C. 55a) [see 5 USCS § 3109], and shall also be entitled to receive travel expenses, including per diem in lieu of subsistence, as authorized by law (5 U.S.C. 73b-2) [see 5 USCS § 5703] for persons in the Government service employed intermittently.

"Sec. 6. Construction. Nothing in this Order shall be construed as subjecting any Federal agency, or any function vested by law in, or assigned pursuant to law to any Federal agency, to the authority of the Committee or as abrogating or restricting any such function in any manner."

Executive Order No. 11776, of Mar. 28, 1974, 39 Fed. Reg. 11865, provided:

"Continuing the President's Committee on Mental Retardation and Broadening Its Membership and Responsibilities

"The President's Committee on Mental Retardation, established by Executive Order No. 11280 on May 11, 1966, has mobilized national planning and carried out basic programs in the field of mental retardation. National goals have been established to reduce the occurrence of mental retardation by one-half before the end of the century and to return one-third of the people in mental institutions to useful lives in their communities. The achievement of these goals will require the most effective possible use of public and private resources.

"Our country has become increasingly aware in recent years of the need to assure those who are retarded their full status as citizens under the law, and of the continuing need to mobilize the support of the general public and of specialized professional and volunteer groups for mental retardation activities. We also know that we must constantly evaluate existing programs to determine their adequacy and must continually consider a broad range of proposals for new mental retardation activities.

"NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, it is hereby ordered as follows:

"Section 1. *Committee continued and responsibilities expanded.* The President's Committee on Mental Retardation (hereinafter referred to as the Committee), with expanded membership and expanded responsibilities, is hereby continued in operation.

"Sec. 2. *Composition of Committee.* The Committee shall be composed of the following members:

"(1) The Secretary of Health, Education, and Welfare, who shall be the Chairman of the Committee.

"(2) The Attorney General.

"(3) The Secretary of Labor.

"(4) The Secretary of Housing and Urban Development.

"(5) The Director of the Office of Economic Opportunity.

"(6) The Director of ACTION.

"(7) Not more than twenty-one other members who shall be appointed to the Committee by the President. These persons may be employed in either the public or the private sectors and may include specialists in medicine and other healing arts, human development, special education, law, and employment problems, as well as members of foundations and other private organizations active in the mental retardation field. Except as the President may from time to time otherwise direct, appointees under this paragraph shall have three-year terms, except that an appointment made to fill a vacancy occurring before the expiration of a term shall be made for the balance of the unexpired term.

"Sec. 3. *Functions of the Committee.* (a) The Committee shall provide such advice and assistance in the area of mental retardation as the President or Secretary of the Department of Health, Education, and Welfare may request and particularly shall advise with respect to the following areas:

"(1) evaluation of the adequacy of the national effort to combat mental retardation;

"(2) identification of the potential of various Federal programs for achieving Presidential goals in mental retardation;

"(3) provision of adequate liaison between Federal activities and related activities of State and local governments, foundations, and other private organizations; and

"(4) development and dissemination of such information as will tend to reduce the incidence of retardation and ameliorate its effects.

"(b) The Committee shall make an annual report to the President concerning mental retardation. Such additional reports or recommendations may be made as the President may require or as the Committee may deem appropriate.

"Sec. 4. *Cooperation by other agencies.* To assist the Committee in providing advice to the President, Federal departments and agencies requested to do so by the Committee shall designate liaison officers with the Committee. Such officers shall, on request by the Committee, and to the extent permitted by law, provide it with information on department and agency programs which do contribute to or which could contribute to achievement of the President's goals in the field of mental retardation.

"Sec. 5. *Administrative arrangements.* (a) The office of the Secretary of the Department of Health, Education, and Welfare shall, to the extent permitted by law, provide the Committee with necessary staff, administrative services, and facilities.

"(b) Each member of the Committee, except any member who then receives other compensation from the United States, may receive compensation for each day he or she is engaged upon the work of the Committee, as authorized by law (5 U.S.C. 3109) [5 USCS § 3109], and may also receive travel expenses, including per diem in lieu of subsistence, as authorized by law (5 U.S.C. 5703) [5 USCS § 5703] for persons in the Government service employed intermittently.

"(c) The Secretary of Health, Education, and Welfare shall perform such other functions with respect to the Committee as may be required by the provisions of the Federal Advisory Committee Act. (5 U.S.C. App. I; 86 Stat. 770) [5 USCS Appx I]."

"Sec. 6. *Construction.* Nothing in this order shall be construed as subjecting any Federal agency, or any function vested by law in, or assigned pursuant to law to, any Federal agency, to the authority of the Committee or as abrogating or restricting any such function in any manner."

"Sec. 7. Executive Order No. 11280 of May 11, 1966, is hereby superseded."

Availability of appropriations. Act June 30, 1970, P. L. 91-296, Title VI, § 601, 84 Stat. 353, as amended by Act June 18, 1973, P. L. 93-45, Title IV, § 401(a), 87 Stat. 95, provided: "Notwithstanding any other provision of law, unless enacted after the enactment of this Act [enacted June 30, 1970] expressly in limitation of the provisions of this section, funds appropriated for any fiscal year ending prior to July 1, 1974, to carry out any program for which appropriations are authorized by the Public Health Service Act (Public Law 410, Seventy-eighth Congress, as amended [for classification, see 42 USCS § 201 note]) or the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963 (Public Law 88-164, as amended [for classification, see above note this section]) shall remain available for obligation and expenditure until the end of such fiscal year."

President's Committee on Mental Retardation continued. Sec. 2(2) of Executive Order No. 11827 of Jan. 4, 1975, 40 Fed. Reg. 1217, provided that the President's Committee on Mental Retardation, created by Executive Order No. 11776, set out as a note to this section, be continued "until January 5, 1977, unless terminated sooner".

Advisory committees and agency reports. For provisions regarding advisory committees established by or pursuant to this Act, and reports required to be made under this Act, see other provisions notes to 42 USCS §§ 217a and 229, respectively.

Applicability and effective date of 1978 amendments. For the applicability and effective date of the amendments made by Act Nov. 6, 1978, see § 515 of that Act, set out as a note to 42 USCS § 6000.

Ex. Or. No. 11280 superseded. Ex. Or. No. 11280 of May 11, 1966, 31 Fed. Reg. 7167, classified as a note to this section, was superseded by Ex. Or. No. 11776 of Mar. 28, 1974, 39 Fed. Reg. 11865. It related to the President's Committee on Mental Retardation.

President's Committee on Mental Retardation continued. Sec. 1-101 of Ex. Or. No. 12110 of Dec. 28, 1978, 44 Fed. Reg. 1069, effective Dec. 31, 1978, provided that the President's Committee on Mental Retardation "is continued until December 31, 1980."

Functions of the President applicable to the Committee on Mental Retardation transferred to the head of the Committee. Ex. Or. No. 12110 of Dec. 28, 1978, 44 Fed. Reg. 1069, effective 12/31/78, provided in pertinent part: "1-102. Notwithstanding the provisions of any other Executive order, the functions of the President under the Federal Advisory Committee Act which are applicable to the committees listed in Section 1-101 of this Order, except that of reporting annually to Congress, shall be performed by the head of the department or agency designated after each committee, in accordance with guidelines and procedures established by the Administrator of General Services."

§ 6032. Applications

(a) Not later than six months after the date of the enactment of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 [enacted Nov. 6, 1978], the Secretary shall establish by regulation standards for university affiliated facilities. These standards for facilities shall reflect the special needs of persons with developmental disabilities who are of various ages, and shall include performance standards relating to each of the activities described in section 102(10) [42 USCS § 6001(10)].

(b) No grant may be made under section 121 [42 USCS § 6031] unless an application therefor is submitted to, and approved by, the Secretary. Such an application shall be submitted in such form and manner, and contain such information, as the Secretary may require. Such an application shall be approved by the Secretary only if the application contains or is supported by reasonable assurances that—

(1) the making of the grant will (A) not result in any decrease in the use of State, local, and other non-Federal funds for services for persons with developmental disabilities and for training of persons to provide such services, which funds would (except for such grant) be made available to the applicant, and (B) be used to supplement and, to the extent practicable, increase the level of such funds; and (2)(A) the applicant's facility is in full compliance with the standards established under subsection (a), or

(B)(i) the applicant is making substantial progress toward bringing the facility into compliance with such standards, and (ii) the facility will, not later than three years after the date of approval of the initial application or the date standards are promulgated under subsection (a), whichever is later, fully comply with such standards.

(c) The Secretary shall establish such a process for the review of applications for grants under section 121 [42 USCS § 6031] as will ensure, to the maximum extent feasible, that each Federal agency that provides funds for the direct support of the applicant's facility reviews the application.

(d)(1) The amount of any grant under section 121(a) [42 USCS § 6031(a)] to a university affiliated facility shall not be less than \$150,000 for any fiscal year.

(2) The amount of any grant under section 121(c) [42 USCS § 6031(c)] to a satellite center which has received a grant under section 121(b) [42 USCS § 6031(b)] (as in effect before the date of the enactment of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 [enacted Nov. 6, 1968]) for the fiscal year ending September 30, 1978, shall not be less than \$75,000 for any fiscal year.

(As amended Nov. 6, 1978, P. L. 95-602, Title V, § 509, 92 Stat. 3009.)

Amendments:

1978. Act Nov. 6, 1978, substituted this section as it appears above (exclusive of subsequent amendment) for the section as it appears in the bound volume.

Other provisions:

Applicability and effective date of 1978 amendments. For the applicability and effective date of the amendments made by Act Nov. 6, 1978, see § 515 of that Act, set out as a note to 42 USCS § 6000.

§ 6033. Authorization of appropriations

(a) For the purposes of making grants under section 121 [42 USCS § 6031], there are authorized to be appropriated \$12,000,000 for the fiscal year ending September 30, 1979, \$14,000,000 for the fiscal year ending September 30, 1980, and \$16,000,000 for the fiscal year ending September 30, 1981.

(b) Of the sums appropriated under subsection (a), not less than—

- (1) \$9,000,000 for the fiscal year ending September 30, 1979,
- (2) \$10,000,000 for the fiscal year ending September 30, 1980, and
- (3) \$11,000,000 for the fiscal year ending September 30, 1981,

shall be made available for grants under subsections (a) and (c) of section 121 [42 USCS § 6031(a), (c)] to qualified applicants which received grants under section 121 [42 USCS § 6031] during the fiscal year ending September 30, 1978. The remainder of the sums appropriated for such fiscal years shall be made available as the Secretary determines, except that not less than 40 percent of such remainder shall be made available for grants under subsections (b) and (c) of section 121 [42 USCS § 6031(b), (c)].

(As amended Nov. 6, 1978, P. L. 95-602, Title V, § 509, 92 Stat. 3010.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES**Amendments:**

1978. Act Nov. 6, 1978, substituted this section as it appears above (exclusive of subsequent amendment) for the section as it appears in the bound volume.

Other provisions:

Applicability and effective date of 1978 amendments. For the applicability and effective date of the amendments made by Act Nov. 6, 1978, see § 515 of that Act, set out as a note to 42 USCS § 6000.

§§ 6041-6043. [Omitted]**HISTORY: ANCILLARY LAWS AND DIRECTIVES**

These sections (§ 6041—Act Oct. 31, 1963, P. L. 88-164, Title I, Part B, § 125[124], 77 Stat. 285; Oct. 30, 1970, P. L. 91-517, Title II, §§ 201(c), 202, 205, 84 Stat. 1326; Oct. 4, 1975, P. L. 94-103, Title I, Part B, § 105, 89 Stat. 488; § 6042—Act Oct. 31, 1963, P. L. 88-164, Title I, Part B, § 126[125], 77 Stat. 285; Dec. 4, 1967, P. L. 90-170, § 2(c), 81 Stat. 527; Oct. 30, 1970, P. L. 91-517, Title II, §§ 201(c), 202, 84 Stat. 1326; Oct. 4, 1975, P. L. 94-103, Title I, Part B, § 105, 89 Stat. 488; § 6043—Act Oct. 31, 1963, P. L. 88-164, Title I, Part B, § 127, as added Oct. 30, 1970, P. L. 91-517, Title II, § 206; 84 Stat. 1326; Oct. 4, 1975, P. L. 94-103, Title I, Part B, § 105, 89 Stat. 488) were omitted by Act Nov. 6, 1978, P. L. 95-602, Title V, § 509, 92 Stat. 3008. They related to the authorization of, applications for, and appropriations for grants for construction projects.

For the effective date and applicability of this omission, see § 515 of Act Nov. 6, 1978, set out as a note to 42 USCS § 6000.

GRANTS FOR PLANNING AND PROVISION OF SERVICES FOR PERSONS
WITH DEVELOPMENTAL DISABILITIES

§ 6061. Authorization of appropriations for allotments

For allotments under section 132 [42 USCS § 6062], there are authorized to be appropriated \$40,000,000 for the fiscal year 1976, \$50,000,000 for fiscal year 1977, and \$60,000,000 for fiscal year 1978, \$55,000,000 for the fiscal year ending September 30, 1979, \$65,000,000 for the fiscal year ending September 30, 1980, and \$75,000,000 for the fiscal year ending September 30, 1981.

(As amended Nov. 6, 1978, P. L. 95-602, Title V, § 510(a), 92 Stat. 3010.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

Amendments:

1978. Act Nov. 6, 1978, substituted this section as it appears above (exclusive of subsequent amendment) for the section as it appears in the bound volume.

Other provisions:

Applicability and effective date of 1978 amendments. For the applicability and effective date of the amendments made by Act Nov. 6, 1978, see § 515 of that Act, set out as a note to 42 USCS § 6000.

§ 6062. Allotments to States

(a) Determination of amount. (1) In each fiscal year, the Secretary shall, in accordance with regulations and this paragraph, allot the sums appropriated for such year under section 131 [42 USCS § 6061] among the States on the basis of—

(A) the population,

(B) the extent of need for services for persons with developmental disabilities, and

(C) the financial need,

of the respective States. Sums allotted to the States under this section shall be used in accordance with approved State plans under section 133 [42 USCS § 6063] for the provision under such plans of services for persons with developmental disabilities.

(2) For any fiscal year, the allotment under paragraph (1)—

(A) to each of American Samoa, Guam, the Virgin Islands, the Northern Mariana Islands, or the Trust Territory of the Pacific Island may not be less than \$100,000 and

(B) to any other State may not be less than the greater of \$250,000, or the amount of the allotment (determined without regard to subsection (d)) received by the State for the fiscal year ending September 30, 1978.

(3) In determining, for purposes of paragraph (1)(B), the extent of need in any State for services for persons with developmental disabilities, the Secretary shall take into account the scope and extent of the services described, pursuant to section 133(b)(2)(B) [42 USCS § 6033(b)(2)(B)], in the State plan of the State.

(b) Apportionment of allotment among State agencies. Whenever the State plan approved in accordance with section 133 [42 USCS § 6063] provides for participation of more than one State agency in administering or supervising the administration of designated portions of the State plan, the State may apportion its allotment among such agencies in a manner which, to the satisfaction of the Secretary, is reasonably related to the responsibilities assigned to such agencies in carrying out the purposes of the State plan. Funds so apportioned to State agencies may be combined with other State or Federal funds authorized to be spent for other purposes, provided the purposes of the State plan will receive proportionate benefit from the combination.

(c) Combined allotments to States involved in joint effort. Whenever the State plan approved in accordance with section 133 [42 USCS § 6063] provides for cooperative or joint effort between States or between or among agencies, public or private, in more than one State, portions of funds allotted to one or more such cooperating States may be combined in accordance with the agreements between the agencies involved.

(d) Reallotment of funds not required by a State. The amount of an allotment to a State for a fiscal year which the Secretary determines will not be required by the State during the period for which it is available for the purpose for which allotted shall be available for reallotment by the Secretary from time to time, on such date or dates as he may fix (but not earlier than thirty days after he has published notice of his intention to make such reallotment in the Federal Register), to other States with respect to which such a determination has not been made, in proportion to the original allotments of such States for such fiscal year, but with such proportionate amount for any of such other States being reduced to the extent it exceeds the sum the Secretary estimates such State needs and will be able to use during such period; and the total of such reductions shall be similarly reallotted among the States whose proportionate amounts were not so reduced. Any amount so reallotted to a State for a fiscal year shall be deemed to be a part of its allotment under subsection (a) for such fiscal year.

(e) [Repealed]

(Oct. 31, 1963, P. L. 88-164, Title I, Part C, § 132, 77 Stat. 286; Aug. 4, 1965, P. L. 89-105, § 2(a)(4), 79 Stat. 427; Dec. 4, 1967, P. L. 90-170, § 3(c), 81 Stat. 528; Oct. 30, 1970, P. L. 91-517, Title I, § 101(b), 84 Stat. 1317; Oct. 4, 1975, P. L. 94-103, Title I, Part C, § 110(b)-(d), (e)(1), Title III, § 302(b)(1), 89 Stat. 489, 506; Apr. 22, 1976, P. L. 94-278, Title XI, § 1107(a), 90 Stat. 416.)

(As amended Nov. 6, 1978, P. L. 95-602, Title V, § 510(b), 92 Stat. 3010.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

Amendments:

1978. Act Nov. 6, 1978, substituted subsec. (a) of this section as it appears above (exclusive of subsequent amendment) for that the subsection as it appears in the bound volume.

Other provisions:

Applicability and effective date of 1978 amendments. For the applicability and effective date of the amendments made by Act Nov. 6, 1978, see § 515 of that Act, set out as a note to 42 USCS § 6000.

§ 6063. State plans

(a) Submission and approval. Any State desiring to take advantage of this part [42 USCS §§ 6061 et seq.] must have a State plan submitted to and approved by the Secretary under this section.

(b) Conditions for approval. In order to be approved by the Secretary under this section, a State plan for the provision of services for persons with developmental disabilities must meet the following requirements:

State Planning Council and Administration of Plan

(1)(A) The plan must provide for the establishment of a State Planning Council, in accordance with section 137 [42 USCS § 6067], for the assignment to the Council of personnel in such numbers and with such qualifications as the Secretary determines to be adequate to enable the Council to carry out its duties under that section, and for the identification of the personnel so assigned.

(B) The plan must designate the State agency or agencies which shall administer or supervise the administration of the State plan and, if there is more than one such agency, the portion of such plan which each will administer (or the portion the administration of which each will supervise).

(C) The plan must provide that each State agency designated under subparagraph (B) will make such reports, in such form and containing such information, as the Secretary may from time to time reasonably require, and will keep such records and afford such access thereto as the Secretary finds necessary to verify such reports.

(D) The plan must provide for such fiscal control and fund accounting procedures as may be necessary to assure the proper disbursement of and accounting for funds paid to the State under this part [42 USCS §§ 6061 et seq.].

Description of Objectives and Services

(2) The plan must—

(A) set out the specific objectives to be achieved under the plan and a listing of the programs and resources to be used to meet such objectives;

(B) describe (and provide for the review annually and revision of the description not less often than once every three years) (i) the extent and scope of services being provided, or to be provided, to persons with developmental disabilities under such other State plans for Federally assisted State programs as the State conducts relating to education for the handicapped, vocational rehabilitation, public assistance, medical assistance, social services, maternal and child health, crippled children's services, and comprehensive health and mental health, and under such other plans as the Secretary may specify, and (ii) how funds allotted to the State in accordance with section 132 [42 USCS § 6062] will be used to complement and augment rather than duplicate or replace services for persons with developmental disabilities which are eligible for Federal assistance under such other State programs;

(C) for each fiscal year, assess and describe the extent and scope of the priority services (as defined in section 102(8)(B) [42 USCS § 6001(8)(B)]) being or to be provided under the plan in the fiscal year; and

(D) establish a method for the periodic evaluation of the plan's effectiveness in meeting the objectives described in subparagraph (A).

Use of Funds

(3) The plan must contain or be supported by assurances satisfactory to the Secretary that—

(A) the funds paid to the State under section 132 [42 USCS § 6062] will be used to make a significant contribution toward strengthening services for persons with developmental disabilities through agencies in the various political subdivisions of the State;

(B) part of such funds will be made available by the State to public or

(C) such funds paid to the State under section 132 [42 USCS § 6062] will be used to supplement and to increase the level of funds that would otherwise be made available for the purposes for which Federal funds are provided and not to supplant such non-Federal funds; and

(D) there will be reasonable State financial participation in the cost of carrying out the State plan.

Provision of Priority Services

(4)(A) The plan must—

(i) provide for the examination not less often than once every three years of the provision, and the need for the provision, in the State of the four different areas of priority services (as defined in section 102(8)(B) [42 USCS § 6001(8)(B)]); and

(ii) provide for the development, not later than the second year in which funds are provided under the plan after the date of the enactment of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 [enacted Nov. 6, 1978], and the timely review and revision of a comprehensive statewide plan to plan, financially support, coordinate, and otherwise better address, on a statewide and comprehensive basis unmet needs in the State for the provision of at least one of the areas of priority services, such area or areas to be specified in the plan, and (at the option of the State) for the provision of an additional area of services for the developmentally disabled, such area also to be specified in the plan.

(B)(i) Except as provided in clause (iii), the plan must provide that not less than \$100,000 or 65 percent of the amount available to the State under section 132 [42 USCS § 6062], whichever is greater, will be expended, as provided in clause (ii), for service activities in the areas of services specified in the plan under subparagraph (A)(ii).

(ii) For any year in which the sums appropriated under section 131 [42 USCS § 6061] do not exceed—

(I) \$60,000,000, not less than \$100,000 or 65 percent of the amount available to the State under section 132 [42 USCS § 6062], whichever is greater, must be expended for service activities in no more than two of the areas of services specified in the plan under subparagraph (A)(ii), and

(II) \$90,000,000, not less than \$100,000 or 65 percent of the amount available to the State under section 132 [42 USCS § 6062], whichever is greater, must be expended for service activities in no more than three of the areas of services specified in the plan under subparagraph (A)(ii).

(iii) A State, in order to comply with clause (i) for a fiscal year beginning before January 1, 1980, is not required to reduce the amount which is available to it under section 132 [42 USCS § 6062] and which is expended for planning activities below the amount so expended for planning activities in the preceding fiscal year, if substantially the remainder of the amount available to the State, which is expended for other than administration, is expended for service activities in the areas of services specified in the plan under subparagraph (A)(ii). For purposes of this clause, expenditures for planning activities do not include any expenditures for service activities (as defined in clause (iv)).

(iv) For purposes of this subparagraph, the term "service activities" includes, with respect to an area of services, provision of services in the area, model service programs in the area, activities to increase the capacity of institutions and agencies to provide services in the area, coordinating the provision of services in the area with the provision of other services, outreach to individuals for the provision of services in the area, the training of personnel to provide services in the area, and similar activities designed to expand the use and availability of services in the area.

(C) Notwithstanding subparagraph (B), upon the application of a State, the Secretary, pursuant to regulations which the Secretary shall prescribe, may permit the portion of the funds which must otherwise be expended under the State plan for service activities in a limited number of areas of services to be expended for service activities in additional areas of services if he determines

that the expenditures of the State on service activities in the initially specified areas of services has reasonably met the need for those services in the State in comparison to the extent to which the need for such additional area or areas of services has been met in such State. Such additional areas shall, to the maximum extent feasible, be areas within the areas of priority services (as defined in section 102(8)(B) [42 USCS § 6001(8)(B)]).

(D) The plan must provide that special financial and technical assistance shall be given to agencies or entities providing services for persons with developmental disabilities who are residents of geographical areas designated as urban or rural poverty areas.

Standards for Provision of Services and Protection of Rights of Recipients of Services

(5)(A)(i) The plan must provide that services furnished, and the facilities in which they are furnished, under the plan for persons with developmental disabilities will be in accordance with standards prescribed by the Secretary in regulations.

(ii) The plan must provide satisfactory assurances that buildings used in in connection with the delivery of services assisted under the plan will meet standards adopted pursuant to the Act of August 12, 1968 (42 U.S.C. 4151-4157 [42 USCS §§ 4151 et seq.]) (known as the Architectural Barriers Act of 1968).

(B) The plan must provide that services are provided in an individualized manner consistent with the requirements of section 112 [42 USCS § 6011] (relating to habilitation plans).

(C) The plan must contain or be supported by assurances satisfactory to the Secretary that the human rights of all persons with developmental disabilities (especially those persons without familial protection) who are receiving treatment, services, or habilitation under programs assisted under this title will be protected consistent with section 111 [42 USCS § 6010] (relating to rights of the developmentally disabled).

(D) The plan must provide assurances that the State has undertaken affirmative steps to assure the participation in programs under this title of individuals generally representative of the population of the State, with particular attention to the participation of members of minority groups.

Professional Assessment and Evaluation Systems

(6) The plan must provide for—

(A) an assessment of the adequacy of the skill level of professionals and paraprofessionals serving persons with developmental disabilities in the State and the adequacy of the State programs and plans supporting training of such professionals and paraprofessionals in maintaining the high quality of services provided to persons with developmental disabilities in the State; and

(B) the planning and implementation of an evaluation system (in accordance with section 110(a) [42 USCS § 6009(a)]).

Utilization of VISTA Personnel; Effect of Deinstitutionalization

(7)(A) The plan must provide for the maximum utilization of all available community resources including volunteers serving under the Domestic Volunteer Service Act of 1973 (Public Law 93-113) [42 USCS §§ 4951 et seq.] and other appropriate voluntary organizations, except that such volunteer services shall supplement, and shall not be in lieu of, services of paid employees.

(B) The plan must provide for fair and equitable arrangements (as determined by the Secretary after consultation with the Secretary of Labor) to protect the interest of employees affected by actions under the plan to provide alternative community living arrangement services (as defined in section 102(8)(E) [42 USCS § 6001(8)(E)]), including arrangements designed to preserve employee rights and benefits and to provide training and retraining of such employees where necessary and arrangements under which maximum efforts will be made to guarantee the employment of such employees.

Additional Information and Assurances Required by Secretary

(8) The plan also must contain such additional information and assurances as the Secretary may find necessary to carry out the provisions and purposes of this part [42 USCS §§ 6061 et seq.].

(c) **Approval of conforming plan**—Notice and hearing prior to final disapproval. The Secretary shall approve any State plan and any modification thereof which complies with the provisions of subsection (b). The Secretary shall not finally disapprove a State plan except after reasonable notice and opportunity for a hearing to the State.

(d) **Availability of allotments for State plans—Payment on condition.** (1) At the request of any State, a portion of any allotment or allotments of such State under this part [42 USCS §§ 6061 et seq.] for any fiscal year shall be available to pay one-half (or such smaller share as the State may request) of the expenditures found necessary by the Secretary for the proper and efficient administration of the State plan approved under this section; except that not more than 5 per centum of the total of the allotments of such State for any fiscal year, or \$50,000, whichever is less, shall be available for the total expenditures for such purpose by all of the State agencies designated under subsection (b)(1)(B) for the administration or supervision of the administration of the State plan. Payments under this paragraph may be made in advance or by way of reimbursement, and in such installments, as the Secretary may determine.

(2) Any amount paid under paragraph (1) to any State for any fiscal year shall be paid on condition that there shall be expended from the State sources for such year for administration of the State plan approved under this section not less than the total amount expended for such purposes from such sources during the previous fiscal year.

(As amended Nov. 6, 1978, P. L. 95-602, Title V, § 511, 92 Stat. 3011.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

References in text:

"This title", referred to in this section, is Title I of Act Oct. 31, 1963, P. L. 88-164, and appears generally as 42 USCS §§ 6000 et seq.; for full classification, consult USCS Tables volumes.

Amendments:

1978. Act Nov. 6, 1978, substituted subsecs. (b) and (d) of this section as they appear above (exclusive of subsequent amendment) for those subsections as they appear in the bound volume.

Other provisions:

Applicability and effective date of 1978 amendments. For the applicability and effective date of the amendments made by Act Nov. 6, 1978, see § 515 of that Act, set out as a note to 42 USCS § 6000.

§ 6064. Payments to the States for planning, administration, and services
From each State's allotments for a fiscal year under section 132 [42 USCS § 6062], the State shall be paid the Federal share of the expenditures, other than expenditures for construction, incurred during such year under its State plan approved under this part [42 USCS §§ 6061 et seq.]. Such payments shall be made from time to time in advance on the basis of estimates by the Secretary of the sums the State will expend under the State plan, except that such adjustments as may be necessary shall be made on account of previously made underpayments or overpayments under this section.

(As amended Nov. 6, 1978, P. L. 95-602, Title V, § 514(b), 92 Stat. 3017.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

Amendments:

1978. Act Nov. 6, 1978, substituted this section as it appears above (exclusive of subsequent amendment) for the section as it appears in the bound volume.

Other provisions:

Applicability and effective date of 1978 amendments. For the applicability and effective date of the amendments made by Act Nov. 6, 1978, see § 515 of that Act, set out as a note to 42 USCS § 6000.

§ 6065. Withholding of payments for planning, administration, and services
Whenever the Secretary, after reasonable notice and opportunity for hearing to the State Planning Council and the appropriate State agencies or agency, designated pursuant to section 133(b)(1) of this title [42 USCS § 6063(b)(1)] finds that—

- (1) there is a failure to comply substantially with any of the provisions required by section 133 of this title [42 USCS § 6063] to be included in the State plan; or
- (2) there is a failure to comply substantially with any regulations of the Secretary which are applicable to this subchapter.

the Secretary shall notify such State Council and agency or agencies that further payments will not be made to the State under section 132 of this title [42 USCS § 6062] (or, in his discretion, that further payments will not be made to the State under section 132 of this title [42 USCS § 6062] for activities in which there is such failure), until he is satisfied that there will no longer be such failure. Until he is so satisfied, the Secretary shall make no further payment to the State under section 132 of this title [42 USCS § 6062], or shall limit further payment under section 132 of this title [42 USCS § 6062] to such State to activities in which there is no such failure.

(As amended Nov. 6, 1978, P. L. 95-602, Title V, § 514(c), 92 Stat. 3017.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

Amendments:

1978. Act Nov. 6, 1978, substituted this section as it appears above (exclusive of subsequent amendment) for the section as it appears in the bound volume.

Other provisions:

Applicability and effective date of 1978 amendments. For the applicability and effective date of the amendments made by Act Nov. 6, 1978, see § 515 of that Act, set out as a note to 42 USCS § 6000.

INTERPRETIVE NOTES AND DECISIONS

Under 42 USCS § 6065, only enforcement authority conferred on federal government is power to withhold funds, and § 6065 does not confer upon Attorney General authority to sue for injunctive relief. *United States v Mattson* (1979, CA9 Mont) 600 F2d 1295.

§ 6066. Nonduplication

In determining the amount of any State's Federal share of the expenditures incurred by it under a State plan approved under section 133 [42 USCS § 6063], there shall be disregarded (1) any portion of such expenditures which are financed by Federal funds provided under any provision of law other than section 132 [42 USCS § 6062], and (2) the amount of any non-Federal funds required to be expended as a condition of receipt of such Federal funds.

(Oct. 31, 1963, P. L. 88-164, Title I, Part C, § 136[140], as added Oct. 30, 1970, P. L. 91-517, Title I, § 101(b), 84 Stat. 1324; Oct. 4, 1975, P. L. 94-103, Title I, Part C, § 115, Title III, § 302(a), (b)(4), 89 Stat. 493, 506.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

Amendments:

1975. Act Oct. 4, 1975, substituted this section for former section which read:

"(a) In determining the amount of any payment for the construction of any facility under a State plan approved under this part, there shall be

disregarded (1) any portion of the costs of such construction which are financed by Federal funds provided under any provision of law other than this part, and (2) the amount of any non-Federal funds required to be expended as a condition of receipt of such Federal funds.

"(b) In determining the amount of any State's Federal share of expenditures for planning, administration, and services incurred by it under a State plan approved under this part, there shall be disregarded (1) any portion of such expenditures which are financed by Federal funds provided under any provision of law other than this part, and (2) the amount of any non-Federal funds required to be expended as a condition of receipt of such Federal funds."

Effective dates:

Section 103 of Act Oct. 30, 1970, provided that this section, as amended, "shall apply with respect to fiscal years beginning after June 30, 1970", and further provided that funds appropriated before June 30, 1970, under 42 USCS former §§ 2671-2677, "shall remain available for obligation during the fiscal year ending June 30, 1971".

Act Oct. 4, 1975, P. L. 94-103, Title III, § 303, 89 Stat. 507, provided: "The amendments made by this Act [42 USCS §§ 6001 et seq.] shall take effect with respect to appropriations under the Act [42 USCS §§ 6001 et seq.] for fiscal years beginning after June 30, 1975."

Redesignation:

Act Oct. 4, 1975, § 302(a), redesignated this section, former § 140 of Act Oct. 31, 1963, to be § 136 of Act Oct. 31, 1963.

Explanatory notes:

This section was formerly classified to 42 USCS § 2677c.

§ 6067. State planning councils

(a)(1) Each State which receives assistance under this part [42 USCS §§ 6061 et seq.] shall establish a State Planning Council which will serve as an advocate for persons with developmental disabilities (as defined in section 102 (7) [42 USCS § 6001(7)]). The members of the State Planning Council of a State shall be appointed by the Governor of the State from among the residents of that State. The Governor of each State shall make appropriate provisions for the rotation of membership on the Council of his respective State. Each State Planning Council shall at all times include in its membership representatives of the principal State agencies, higher education training facilities, local agencies, and nongovernmental agencies and groups concerned with services to persons with developmental disabilities in that State.

(2) At least one-half of the membership of each such Council shall consist of persons who—

(A) are persons with developmental disabilities or parents or guardians of such persons, or

(B) are immediate relatives or guardians of persons with mentally impairing developmental disabilities,

who are not employees of a State agency which receives funds or provides services under this part [42 USCS §§ 6061 et seq.], who are not managing employees (as defined in section 1126(b) of the Social Security Act [42 USCS § 1320a-5(6)]) of any other entity which receives funds or provides services under this part [42 USCS §§ 6061 et seq.], and who are not persons with an ownership or control interest (within the meaning of section 1124(a)(3) of the Social Security Act [42 USCS § 1320a-3(a)(3)]) with respect to such an entity.

(3) Of the members of the Council described in paragraph (2)—

(A) at least one-third shall be persons with developmental disabilities, and

(B)(i) at least one-third shall be individuals described in subparagraph (B) of paragraph (2), and (ii) at least one of such individuals shall be an immediate relative or guardian of an institutionalized person with a developmental disability.

(b) Each State Planning Council shall—

- (1) develop jointly with the State agency or agencies designated under section 133(b)(1)(B) [42 USCS § 6063(b)(1)(B)] the State plan required by this part [42 USCS §§ 6061 et seq.], including the specification of areas of services under section 133(b)(4)(A)(ii) [42 USCS § 6063(b)(4)(A)(ii)];
- (2) monitor, review, and evaluate, not less often than annually, the implementation of such State plan;
- (3) to the maximum extent feasible, review and comment on all State plans in the State which relate to programs affecting persons with developmental disabilities; and
- (4) submit to the Secretary, through the Governor, such periodic reports on its activities as the Secretary may reasonably request, and keep such records and afford such access thereto as the Secretary finds necessary to verify such reports.

(c) [Repealed]

(As amended Nov. 6, 1978, P. L. 95-602, Title V, § 512, 92 Stat. 3015.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1978. Act Nov. 6, 1978, substituted this section as it appears above (exclusive of subsequent amendment) for the section as it appears in the bound volume.

Other provisions:

Applicability and effective date of 1978 amendments. For the applicability and effective date of the amendments made by Act Nov. 6, 1978, see § 515 of that Act, set out as a note to 42 USCS § 6000.

§ 6068. Judicial review

If any State is dissatisfied with the Secretary's action under section 133(c) [42 USCS § 6063(c)] or section 135 [42 USCS § 6065], such State may appeal to the United States court of appeals for the circuit in which such State is located, by filing a petition with such court within sixty days after such action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary, or any officer designated by him for that purpose. The Secretary thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28, United States Code [28 USCS § 2112]. Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part, temporarily or permanently, but until the filing of the record, the Secretary may modify or set aside his order. The findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive, but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of the fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence. The judgment of the court affirming or setting aside, in whole or in part, any action of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code [28 USCS § 1254]. The commencement of proceedings under this section shall not, unless so specifically ordered by the court, operate as a stay of the Secretary's action.

(Oct. 31, 1963, P. L. 88-164, Title I, Part C, § 138[142], as added Oct. 4, 1975, P. L. 94-103, Title I, Part C, § 117, Title III, § 302(a), (b)(5), 89 Stat. 494, 506.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1975. Act Oct. 4, 1975, § 302(b)(5), substituted "133" for "134", and "135", for "136" in this section as added and redesignated by Act Oct. 4, 1975.

Effective dates:

Act Oct. 4, 1975, P. L. 94-103, Title III, § 303, 89 Stat. 507, provided: "The amendments made by this Act [42 USCS §§ 6001 et seq.] shall take effect with respect to appropriations under the Act [42 USCS §§ 6001 et seq.] for fiscal years beginning after June 30, 1975."

Redesignation:

Act Oct. 4, 1975 (§ 302(a)), redesignated this section, former § 142 of Act Oct. 31, 1963, as added by Act Oct. 4, 1975, § 117, to be § 138 of Act Oct. 31, 1963.

§ 6081. Grant authority

(a) The Secretary, may make project grants to public or nonprofit private entities for—

(1) demonstrations (and research and evaluation in connection therewith) for establishing programs which hold promise of expanding or otherwise improving services (particularly priority services) to persons with developmental disabilities (especially those who are disadvantaged or multihandicapped); and

(2) demonstrations (and research, training, and evaluation in connection therewith) for establishing programs which hold promise of expanding or otherwise improving protection and advocacy services related to the state protection and advocacy system (described in section 113 [42 USCS § 6012]).

(b) Grants provided under subsection (a) shall include grants for—

(1) public awareness and public education programs to assist in the elimination of social, attitudinal, and environmental barriers confronted by persons with developmental disabilities;

(2) coordinating and using all available community resources in meeting the needs of persons with developmental disabilities (especially those from disadvantaged backgrounds);

(3) demonstrations of the provision of services to persons with developmental disabilities who are also disadvantaged because of their economic status;

(4) technical assistance relating to services and facilities for persons with developmental disabilities, including assistance in State and local planning or administration respecting such services and facilities;

(5) training of specialized personnel needed for the provision of services for persons with developmental disabilities or for research directly related to such training;

(6) developing or demonstrating new or improved techniques for the provision of services to persons with developmental disabilities (including model integrated service projects);

(7) gathering and disseminating information relating to developmental disabilities;

(8) improving the quality of services provided in and the administration of programs for such persons; and

(9) developing or demonstrating innovative methods to attract and retain professionals to serve in rural areas in the habilitation of persons with developmental disabilities.

(c) The Secretary shall establish procedures to insure participation of persons with

developmental disabilities and their parents or guardians in determining priorities to be utilized by the Secretary in making grants under this section.

(d) No grant may be made under subsection (a) unless an application therefor has been submitted to, and approved by, the Secretary. Such application shall be in such form, submitted in such manner, and contain such information, as the Secretary shall by regulation prescribe. The Secretary may not approve such an application unless the State in which the applicant's project will be conducted has a State plan approved under part C [42 USCS §§ 6061 et seq.]. The Secretary shall provide to the State Planning Council for the State in which an applicant's project will be conducted an opportunity to review the application for such project and to submit its comments thereon.

(e) Payments under grants under subsection (a) may be made in advance or by way of reimbursement, and at such intervals and on such conditions, as the Secretary finds necessary. The amount of any grant under subsection (a) shall be determined by the Secretary. In determining the amount of any grant under subsection (a) for the costs of any project, there shall be excluded from such costs an amount equal to the sum of (1) the amount of any other Federal grant which the applicant has obtained, or is assured of obtaining, with respect to such project, and (2) the amount of any non-Federal funds required to be expended as a condition of such other Federal grant.

(f) For the purpose of making payments under grants under subsection (a), there are authorized to be appropriated \$18,000,000 for fiscal year 1976, \$22,000,000 for fiscal year 1977, \$25,000,000 for fiscal year 1978, \$20,000,000 for the fiscal year ending September 30, 1979, \$22,000,000 for the fiscal year ending September 30, 1980, and \$26,000,000 for the fiscal year ending September 30, 1981.

(g) Of the funds appropriated under subsection (f) for any fiscal year, not less than 25 per centum of such funds shall be used for projects which the Secretary determines are of national significance.

(h) No funds appropriated under the Public Health Service Act [42 USCS §§ 201 et seq.], under this Act [42 USCS §§ 6000 et seq.] (other than under subsection (f) of this section), or under section 304 of the Rehabilitation Act of 1973 [29 USCS § 774] may be used to make grants under subsection (a).

(As amended Nov. 6, 1978, P. L. 95-602, Title V, §§ 504(b)(2), (3), 513, 92 Stat. 3006, 3016; July 10, 1979, P. L. 96-32, § 3(a), 93 Stat 82.)

HISTORY: ANCILLARY LAWS AND DIRECTIVES

Amendments:

1978. Act Nov. 6, 1978, substituted this section as it appears above (exclusive of subsequent amendment) for the section as it appears in the bound volume.

1979. Act July 10, 1979, amended § 504(b)(3) of amending Act Nov. 6, 1978 in order to correct an error in said § 504(b)(3), thereby clarifying the language of subsec. (f) of this section.

Other provisions:

Applicability and effective date of 1978 amendments. For the applicability and effective date of the amendments made by Act Nov. 6, 1978, see § 515 of that Act, set out as a note to 42 USCS § 6000.

FINAL REGULATIONS^{*}
DEVELOPMENTAL DISABILITIES ACT

45 C.F.R. Parts 1385-1388

^{*} Note new proposed regulations in section following this.

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App. B-318

SUBCHAPTER I—THE ADMINISTRATION FOR HANDICAPPED INDIVIDUALS, DEVELOPMENTAL DISABILITIES PROGRAM

PART 1385--GENERAL

- Sec.
1385.1 Purpose of Act.
1385.2 Terms.
1385.3 Grants administrative requirements
1385.4 Judicial review
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1385.6 Employment of handicapped individuals
1385.7 Recovery
1385.8 Good cause for other use of facility
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1385.10 Awards.
1385.11 Assurances regarding evaluation system

Authority: Pub. L. 91-517, Pub. L. 94-103

Source: 42 FR 5776, Jan. 27, 1977, unless otherwise noted

§ 1385.1 Purpose of Act

The purpose of the Act is to improve and coordinate the provision of services to persons with developmental disabilities and to establish a system for the protection and advocacy of rights for persons with developmental disabilities through:

(a) Grants to assist the States in developing and implementing a comprehensive and continuing plan for identifying and meeting the needs of the developmentally disabled;

(b) Support of activities which contribute to improving the condition of persons with developmental disabilities;

(c) Renovation and modernization of university affiliated facilities which demonstrate the provision of services for the demonstration and interdisciplinary training programs in university affiliated facilities;

(d) Training specialized personnel needed for providing such services;

(e) Provision of technical assistance in the establishment of services and facilities for the developmentally disabled; and

(f) Development and demonstration of new and improved techniques for providing such services.

To these ends, Federal financial assistance is available through (1) basic support formula grants to States; (2) formula grants to States for effecting a system to protect and advocate the rights of developmentally disabled persons; (3) grants to university affiliated facilities and for satellite centers; and (4) grants to public and private nonprofit groups for demonstration projects and projects of national significance.

§ 1385.2 Terms.

(a) For purposes of Parts 1386 and 1387, the terms below are defined as follows:

(1) "Act" means the Developmental Disabilities Services and Facilities Construction Act, as amended by the Developmentally Disabled Assistance and Bill of Rights Act;

(2) "Construction" means (i) the construction of new buildings, acquisition, expansion, remodeling, and alteration of existing buildings, (ii) initial equipment for such buildings including medical and other transportation facilities, and (iii) architect's fees in connection with an approved project. Construction does not include the cost of offsite improvements or the cost of the acquisition of land;

(3) "Costs of administration and operation," for purposes of Part 1387 of this chapter, means those administrative and operating costs of university affiliated facilities which are necessary to support interdisciplinary training programs and demonstration facilities providing services to developmentally disabled persons. Eligible costs shall be specified in guidelines to be issued by the Secretary;

(4) "Cost of construction" means the amount found by the Secretary to be necessary for the construction of a project, approved under Parts 1386 and 1387 of this chapter;

(5) "Demonstration" means, for the purposes of Part 1387 of this chapter, (a) a pilot study or experimental attempt to provide more and better serv-

ices than are available, for the purpose of testing or establishing standards or methods of service that are practicable and effective for general application in the developmental disabilities program; (ii) provision of a special type of service in order to test its value and to provide information on costs, methods of administration, methods of providing services, or techniques; or (iii) application in new settings of the results derived from previous research or practice for the purpose of determining the effectiveness of new procedures.

(6) "Developmental disability"

means a disability of a person which (i) is attributable to mental retardation, cerebral palsy, epilepsy, or autism; (ii) is attributable to any other condition of a person found to be closely related to mental retardation because such condition results in similar impairment of general intellectual functioning for adaptive behavior to that of mentally retarded persons or requires treatment and services similar to those required for such persons; or (iii) is attributable to dyslexia resulting from a disability described in paragraph (a) (i) or (ii); (iv) originates before such person attains age eighteen; (v) has continued or can be expected to continue indefinitely; and (vi) constitutes a substantial handicap to such person's ability to function normally in society;

(7) "Director" means the Director of the Developmental Disabilities Office, Office of Human Development.

(8) "Equipment," for the purposes of construction under Parts 1386 and 1387 of this Chapter, means those items which are necessary for the initial operation of the facility, but does not include supplies such as food, fuel, drugs, and paper.

(9) "Exemplary services" means those specialized services, including adaptation of generic services, for the diagnosis, treatment, education, training, habilitation, and care of persons with developmental disabilities, conducted in or in conjunction with a university affiliated facility (or satellite) for purposes of demonstration or training which are of replicable high quality.

(10) "Facility for persons with developmental disabilities" means a facility, or a specified portion of a facility, designed primarily for the delivery of one or more services to persons with one or more developmental disabilities;

(11) "Interdisciplinary training" means an integrated educational program utilized reciprocally by two or more disciplines each of which is knowledgeable about or possesses, in relationship to common fields of endeavor, a basic language, a core body of knowledge, certain relevant skills, and an understanding of the attitudes, values, and methods of participating disciplines. Interdisciplinary training includes training with practicum which enhance the skills of the trainee in collaboration with or complementing the services rendered by members of other disciplines;

(12) "National Advisory Council" means the National Advisory Council on Services and Facilities for the Developmentally Disabled;

(13) "Nonprofit facility for persons with developmental disabilities" and "nonprofit private institution of higher learning" mean, respectively, a facility for persons with developmental disabilities and an institution of higher learning which are owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual; and the term "nonprofit private agency or organization" means an agency or organization which is such a corporation or association or which is owned and operated by one or more of such corporations or associations;

(14) "Population" as applied to any State means the population of that State as determined by the most recent official estimates by the U.S. Department of Commerce made available to the Secretary;

(15) "Project period" means the period of time, not exceeding three years, for which a project is approved for grant support with Federal funds. Such period may be extended by the Secretary beyond three years for a period not to exceed twelve months, and with or without additional fund-

ing, in order to permit continuation or completion of the same approved project. The approval and support of a project for the maximum project period shall not preclude additional support of that project beyond such period if such support of the continued project is requested, evaluated, and approved on the same basis as a new or initial application in accordance with § 1387.22 of this chapter;

(16) "Projects of national significance" means projects (i) designed to have a direct impact on developmental disabilities programs throughout the country; or (ii) having an objective or objectives which if achieved could be repeated or result in an improved delivery system for developmental disabilities services or affect national policies or standards; or (iii) involving activities to be conducted in a number of sites in various parts of the country as part of a unified program;

(17) "Public agency" means any State, unit of local government, combination of such States or units, or any department, agency, or instrumentality of any of the foregoing, including State institutions of higher education and hospitals, or any Indian tribal government;

(18) "Satellite center" means an entity which is associated with one or more university affiliated facilities and which functions as a community or regional extension of such university affiliated facilities in the delivery of training, services, and programs to the developmentally disabled and their families, to personnel of State agencies concerned with developmental disabilities, and to others responsible for the care of persons with developmental disabilities;

(19) "Secretary" means the Secretary of Health, Education, and Welfare, or a designee;

(20) "Services for persons with developmental disabilities" means specialized services or special adaptations of generic services directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with such a disability. Such services include: Diagnosis, evaluation, treatment, personal care, day care, domiciliary care, special

living arrangements, training, education, sheltered employment, recreation, counseling of the individual with a developmental disability and of his family, protective and other social and socio-legal services, information and referral services, follow-along services, and transportation services necessary to assure delivery of services to persons of all ages with developmental disabilities;

(21) "State" means the several States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands;

(22) "State agency(ies)" except for the purpose of Part 1386, Subpart C means the State agency or agencies designated in the State plan to administer or supervise the administration of all or designated portions of the State plan;

(23) "State agency for construction" means the sole State agency designated to administer or supervise the administration of grants for construction of facilities for the developmentally disabled under the State plan;

(24) "State plan" means the document or documents submitted by the State to comply with the requirements for participation under Parts 1386 and 1387 of this chapter;

(25) "State planning council" (referred to alternately as "State council" or "council") means that body, the members of which are appointed by the Governor, which is responsible for supervising the development of comprehensive planning for persons with developmental disabilities, monitoring of the plan, and evaluating its results, and which serves as an advocate for persons with developmental disabilities;

(26) "Substantial handicap" means a physical or mental disability or both of such severity that, alone or in connection with social, legal, or economic constraints, it requires the provision of specialized services over an extended period of time directed toward the individual's social, personal, physical, or economic habilitation or rehabilitation;

(27) "Technical assistance" means the furnishing of consultative, technical, and informational services to

States, local or other public or private agencies, organizations, or individuals in matters pertaining to planning, provision of services, construction of facilities, and the organization and management of facilities and programs for developmentally disabled persons:

(28) "Title" (except when it refers to the Code of Federal Regulations) means a fee simple, or such other estate or interest (including a leasehold on which the rental does not exceed 4 per centum of the value of the land) as the Secretary finds sufficient to assure for a period of not less than fifty years undisturbed use and possession for the purposes of construction and operation of the project;

(29) "University affiliated facility" means a public or other non-profit facility which is associated with or is an integral of, a college or university, which aids in demonstrating the provision of specialized services for the diagnosis and treatment of persons with developmental disabilities, and which provides education and training (including interdisciplinary training) of personnel needed to render services to persons with developmental disabilities.

(30) "Urban or rural poverty area" means a census tract, census country division, or minor civil division, as applicable, in which a percentage (which is at least the percentage determined in accordance with the following sentence) of the residents have incomes below the poverty level, as defined by the Secretary of Commerce. The percentage referred to in the preceding sentence shall be derived so that the total population of such areas as a percent of the population of the United States is equal to the total population of the United States with incomes below such poverty level, as a percent of the total population of the United States, plus five percent.

(31) "Volunteer" means a person who provides a service on a non-paid basis, except for reimbursement of actual expenses, and who works in concert with other services toward shared objectives on an individual or group assignment.

§ 1385.3 Grants administrative requirements.

(a) The provisions of 45 CFR Part 74, establishing uniform administrative requirements and cost principles for grants to State and local governments, shall apply to all grants funded under Parts 1386 and 1387 of this chapter.

(b) Attention is called to the applicability, as cited therein, of the provisions of the following parts of Title 45, CFR to grants funded under Parts 1386 and 1387 of this chapter:

45 CFR Part 16 Department Grant Appeals Process

45 CFR Part 46 Protection of Human Subjects

45 CFR Part 75 Informal Grant Appeals Procedures, Subpart A Indirect Cost Appeals

45 CFR Part 80 Nondiscrimination under Programs Receiving Federal Assistance through the Department of Health, Education, and Welfare Effectuation of Title VI of Civil Rights Act of 1964

45 CFR Part 81 Practice and Procedure for Hearings under Part 80 of this Title

(c) Each recipient of assistance under these Parts shall keep records (1) which fully disclose (i) the amount and disposition by such recipient of the proceeds of such assistance, (ii) the total cost of the project or undertaking in connection with which such assistance is given or used, and (iii) the amount of that portion of the cost of the project or undertaking supplied by other sources, and (2) such other records as will facilitate an effective audit.

§ 1385.4 Judicial review.

If any State is dissatisfied with the Secretary's action under § 1386.2 or § 1386.15 such State may appeal to the United States Court of Appeals for the circuit in which such State is located, by filing a petition with such court within sixty days after such action, in accordance with 42 U.S.C. 2694

§ 1385.5 State control of operations.

Except as otherwise specifically provided, nothing in Parts 1386 and 1387 of this chapter shall be construed as conferring on any Federal officer or employee the right to exercise any supervision or control over the adminis-

tration, personnel, maintenance, or operation of any facility for persons with developmental disabilities with respect to which any funds have been or may be expended under these parts.

participation bore to the cost of the construction of such project or projects. Such right of recovery shall not constitute a lien upon such facility prior to judgment.

§ 1385.6 Employment of handicapped individuals.

As a condition for the receipt of financial assistance under Parts 1386 and 1387 of this chapter each recipient of such assistance shall take affirmative action to employ and advance in employment qualified handicapped individuals on the same terms and conditions required with respect to the employment of such individuals by the provisions of sections 503 and 504 of the Rehabilitation Act of 1973 which govern employment (a) by State rehabilitation agencies and rehabilitation facilities; and (b) under Federal contracts and subcontracts.

§ 1385.7 Recovery.

The State council shall promptly notify the Secretary in writing if, any time within 20 years after the completion of construction, any facility which received funds under Part 1386, Subpart A and Part 1387, Subpart A of this chapter (a) is sold or transferred to any person, agency, or organization not qualified to file an application under the Act or not approved as a transferee by the State agency; or (b) ceases to be a public or other nonprofit facility for persons with developmental disabilities. Unless there is good cause in conformance with § 1385.8 for releasing the applicant or other owner from obligation to continue such facility as a facility for developmentally disabled persons, the United States shall be entitled to recover from either the transferor or the transferee (or, in the case of a facility which has ceased to be a public or other nonprofit facility for persons with developmental disabilities, from the owners thereof) an amount bearing the same ratio to the then value as determined by the agreement of the parties or by action brought in the district court of the United States for the district in which the facility is situated of so much of such facility as constituted an approved project or projects, as the amount of the Federal

§ 1385.8 Good cause for other use of facility.

If, within 20 years after completion of any construction for which a construction grant under the Act has been made, the facility shall cease to be a public or nonprofit facility for persons with developmental disabilities, the Secretary in determining whether there is good cause for releasing the applicant or other owner of the facility from the obligation to continue such facility as a public or other nonprofit facility for persons with developmental disabilities, shall take into consideration the extent to which:

(a) The facility will be devoted by the applicant or other owner to use for another public purpose which will promote the purposes of the Act; or

(b) There are reasonable assurances that for the remainder of the 20 year period other facilities not previously utilized for the care of persons with developmental disabilities will be so utilized and are substantially equivalent in nature and extent for such purposes.

§ 1385.9 Cooperative or joint effort between States and agencies.

An application providing for participating in a joint effort between States or among public or private agencies, or by any combination of such entities, shall be in accordance with the agreements in writing between the entities involved.

§ 1385.10 Awards

All awards under Parts 1386 and 1387 of this chapter shall be in writing and shall set forth the amount awarded. Awards under Part 1387 of this chapter shall also specify the project period for which support is contemplated.

(a) Federal financial participation shall be available under Parts 1386 and 1387 of this chapter only for those activities approved in the grant award

and only in the total amount approved in the award.

(b) Under Part 1386, Subpart A of this chapter, Federal financial participation may be available in expenditures made under the State plan including expenditures for the State council and the administration of the State plan, in accordance with applicable State laws, rules, regulations, and standards governing expenditures by State and local agencies. The cost of acquiring land for a construction project under Parts 1386 and 1387 is not eligible for Federal financial participation. As a condition for Federal financial participation, the annual revision of the State plan and other required reports must be submitted by the State planning council and approved by the Secretary.

§ 1385.11 Assurances regarding evaluation system.

(a) Within six months after the development by the Secretary of an evaluation system in accordance with the Act as a condition to the receipt of Federal financial assistance under Parts 1386 and 1387 of this chapter, each State shall submit to the Secretary a proposal for a time-phased method of implementing the system. Proposals shall be submitted in the form and at the time set forth in guidelines which will be issued by the Secretary.

(b) Within two years after the date of the development of such a system, each State shall provide assurances satisfactory to the Secretary that the State is using such a system.

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AUTHORITY Pub L. 95-517, Pub L. 94-103

SOURCE 42 FR 5279, Jan. 27, 1977, unless otherwise noted

Subpart A—The State Plan

GENERAL

§ 1386.1 Purpose and assurances.

(a) *General.* Any State wishing to take advantage of Federal financial assistance under this Subpart must have a State plan approved annually by the Secretary.

(b) *Form and content.* The State plan, which is to be prepared by the

designated State agency(ies) in accordance with supervision provided by the State Council, shall contain, in the form prescribed by the Secretary, a specific description of the State's program, the plans and policies to be followed in carrying out the program, a description of the planning process as developed by the State council and utilized in developing the program, and such other information as prescribed by the Secretary. Basic principles for the planning processes and suggested alternative models will be described in guidelines issued by the Secretary. The State plan shall consist of the following parts which shall be amended, reaffirmed, or updated annually as applicable:

(1) A part setting forth data necessary to comply with assurances required in the Act, and all regulations, policies, and procedures which shall be established by the Secretary;

(2) A part which describes the State goals, annual objectives to achieve the goals, priorities, evaluation methods, and the rationale for annual changes;

(3) A part containing measurable objectives and strategies (i) to reduce and eventually eliminate inappropriate institutional placement of people with developmental disabilities; and (ii) to improve the quality of care and state of surroundings of persons for whom institutional care is appropriate;

(4) A part containing a design for implementation of the plan as set forth in § 1386.50, and

(5) A part containing the following assurances: (i) Authority of the State agency(ies). The State plan shall certify that the State agency(ies) has authority to administer or supervise the administration of all or portions of the State plan, and that nothing in the State plan is inconsistent with State law.

(ii) Funds made available to other agencies. (A) Part of the funds paid to the State will be made available to other public agencies or other non-profit private agencies, institutions, and organizations for the purposes of carrying out the Act; (B) Such funds shall be expended in accordance with State procedures and standards and in accordance with the requirements con-

ained in these regulations and policies established by the Secretary;

(iii) State participation in carrying out the State plan. That there will be reasonable State financial participation in the cost of carrying out the State plan. Reasonable State participation shall include evidence of the following: (A) That there is an organizational unit responsible for program administration; (B) That adequate staff is available for administration of the plan, and (C) That State appropriated funds will be used in part to support the activities included under the State plan.

(iv) Anticipated contribution toward strengthening services. That the funds paid to the State will be used to make significant contribution toward strengthening services for persons with developmental disabilities in the various political subdivisions of the State, in order to improve the quality, extent, and scope of services.

(v) Maintenance of effort. That funds paid the State under the State plan will be used to supplement and, to the extent practicable, increase the level of funds that would otherwise be made available for the purposes for which the Federal funds are provided, and not to supplant such non-Federal funds. Compliance with such assurance will be deemed to have been met if the aggregate level of State, local, and private non-profit funds available in the State for activities supported under the approved State plan is at least no lower for any fiscal year than it was for the immediately preceding fiscal year as reported in required financial reports, provided that the Secretary may also take into consideration the extent to which the level of such funds for any fiscal year may have included emergency or other funds for an activity of a non-recurring nature;

(vi) Human rights and welfare of individuals receiving services. That the human rights of all persons (especially those without familial protection) receiving services under Parts 1386 and 1387 of this chapter will be protected;

(vii) Services for persons unable to pay. That a reasonable volume of services will be furnished to persons unable to pay therefor. As used in this

section, persons unable to pay therefor include persons who are otherwise self-supporting but are unable to pay the full cost of needed services. Such services may be paid for wholly or partly out of public funds or contributions of individuals and private and charitable organizations, or may be contributed at the expense of the provider of services itself. In determining what constitutes a reasonable volume of services to persons unable to pay therefor, there shall be considered the amount of services that may be available through generic agencies. The requirements may be waived if it is demonstrated to the satisfaction of the State agency, subject to subsequent approval by the Secretary, that to furnish such services is not feasible financially.

(viii) Financial support for facilities. That adequate financial support will be available to complete the construction of, and to maintain and operate the facility when such construction is completed. Compliance with this assurance may be made by a showing from the grantee that adequate funds are or will be on deposit in a bank, or that program income from services provided is or will be adequate, or that State and local funds will be made available for maintenance and operation upon completion of construction;

(ix) Payment of construction workers. That all laborers and mechanics employed by contractors or subcontractors in the performance of work on any construction project assisted with funds under this subpart and Subpart A, Part 1387 of this Chapter will be paid at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Act of March 3, 1931 (40 U.S.C. 276a-276a-5, known as the Davis-Bacon Act); and the Secretary of Labor shall have with respect to the labor standards specified in this paragraph the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 FR 3176, 5 U.S.C. Appendix) and section 2 of the Act of June 13, 1934 (40 U.S.C. 276c); and

(x) Compliance with assurance for habilitation plans for developmentally disabled persons. Each State receiving

an allotment under this Subpart after September 30, 1976, shall satisfactorily assure the Secretary that each program (including programs of any agency, facility, or project) which receives funds from the State's allotment under this Subpart has in effect for each developmentally disabled person who receives services from or under the program a habilitation plan and that such plans are reviewed annually.

(6) A part containing those requirements in §§ 1386.20 through 1386.49.

§ 1386.2 Plan submission and approval.

(a) The State plan (and its annual revisions) shall be submitted by the chairperson of the State council to the Secretary 60 days prior to the fiscal year for which the plan is applicable.

(b) Failure to submit an approvable plan or annual revision prior to the fiscal year for which the plan is applicable shall result in the loss of Federal financial participation in the cost of expenditures during the period of the fiscal year for which an approvable plan or annual or other revision has not been submitted.

(c) Any State plan, amendment, or revision meeting the requirements of the Act, this Subpart, and performance standards to be issued by the Secretary shall be approved.

(d) Final disapproval of any State plan or annual or other revision shall be determined by the Secretary; except that no State plan or any revision thereof shall be finally disapproved until after the State has been given reasonable notice and opportunity for a hearing in accordance with Subpart D of this part.

(e) In accordance with the Office of Management and Budget Circular A-95 the Governor shall be given an opportunity to review and comment on the State plan, plan amendments, and related material, except for periodic statistical, or budget, and other fiscal reports. The Office of the Governor shall have 45 days to review such plan material prior to its submission to the Secretary. Any comments made shall be transmitted to the Department with the documents.

§ 1386.3 Designation of State agency(ies) for administration.

(a) The State plan shall name the designated State agency(ies) which shall administer all or designated portions of the State plan: *Provided*, That a sole State agency is to be designated for administering or supervising the administration of grants for construction.

(b) If the State plan designates more than one State agency to administer the State plan, it shall set forth the portion of the program for which each State agency is responsible.

(c) The State may apportion its allotment among such agencies in proportion to the responsibilities assigned to such agencies for carrying out activities approved under the State plan. Funds so apportioned may be combined with other State or Federal funds authorized to be spent for other purposes, provided the purpose of the State plan will receive proportionate benefit from the combination.

§ 1386.4 Identification of administrative program unit.

The State plan shall provide for and identify a program unit within the designated State administering agency, which has primary responsibility for proper and efficient administration of the State plan.

ALLOTMENTS, FEDERAL SHARE, AND PAYMENTS

§ 1386.10 Allotments to States.

The allotment to the several States shall be computed by the following formula:

(a) Two thirds on the basis of total population weighted by financial need determined by the relative per capita income as shown by data supplied by the U.S. Department of Commerce for the three most recent consecutive years for which satisfactory data are available.

(b) One-third on the basis of a need factor based on the ratio of beneficiaries in the State receiving benefits under the Adult Disabled Child Program (section 202(d)(1)(B)(i) of the Social Security Act) related to population of the State age 18-65 as bearing on the national total of such popula-

tion weighted by the total population of the State

(c) For the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands, the allotment in any fiscal year beginning July 1, 1975, shall not be less than \$50,000. The allotment of each other State in any fiscal year shall not be less than the greater of \$150,000, or the amount of the allotment received by the State for the fiscal year ending June 30, 1974.

(d) If the amount appropriated for State allotments for any fiscal year exceeds \$50,000,000, the minimum allotment of a State for such fiscal year shall be increased by an amount which bears the same ratio to the amount determined for such State as the difference between the amount so appropriated and the amount authorized to be appropriated for such fiscal year bears to \$50,000,000.

§ 1386.11 Reallotment of funds.

The amount of an allotment to a State for a fiscal year which the Secretary determines will not be required by the State during the period for which it is available for the purpose for which allotted shall be available for reallotment by the Secretary from time to time, on such date or dates as may be fixed (but not earlier than thirty days after notice has been published of the Secretary's intention to make such reallotment in the FEDERAL REGISTER), to other States with respect to which such a determination has not been made, in proportion to the original allotments of such States for such fiscal year, but with such proportionate amount for any of such other States being reduced to the extent it exceeds the sum the Secretary estimates such State needs and will be able to use during such period; and the total of such reductions shall be similarly reallotted among the States whose proportionate amounts were not so reduced. Any amount so reallotted to a State for a fiscal year shall be deemed to be a part of its allotment for such fiscal year.

§ 1386.12 Conditions on uses of allotments.

(a) For the fiscal year ending June 30, 1976 not less than 10 per centum of each State's allotment shall be expended for the purpose of assisting in developing and implementing plans designed to eliminate inappropriate placement in institutions of persons with developmental disabilities. For each succeeding fiscal year, 30 per centum of the State's allotment shall be used for these purposes.

(b) Designation of allotment for construction. The State plan shall specify the per centum of the State's allotment in any fiscal year which is to be devoted to construction of facilities. Such per centum shall be not more than 10 per centum of the State's allotment or such lesser per centum as the Secretary may from time to time prescribe.

(c) Sums allotted to a State in a fiscal year and designated by it for construction and remaining unobligated at the end of such year shall remain available to such State for such purpose in the next fiscal year (and in such year only), in addition to the sums allotted to such State in such next fiscal year; except that if the maximum amount which may be specified for construction for a year plus any part of the amount so specified pursuant to such section for the preceding fiscal year and remaining unobligated at the end of such fiscal year is not sufficient to pay the Federal share of the cost of construction of a specific facility included in the construction program of the State, the amount specified for such preceding year shall remain available for a second additional year for the purpose of paying the Federal share of the cost of construction of such facility.

(d) Expenditures for proper and efficient administration of the State plan. (1) At the request of the State, a portion of the State's allotment shall be made available by the Secretary to pay not more than one half of the expenditures described in this paragraph for proper and efficient administration of the approved State plan: *Provided*, That not more than 5 per centum or \$50,000, whichever is less, shall be available for this purpose. (2) Pay

ments under this section shall be made only on the condition that expenditures from State appropriations for administration of the State plan shall not be less than State expenditures for the fiscal year ending June 30, 1975.

(3) Costs identified in the approved State plan as necessary for the administration of the program shall not include costs applicable to provision of services, planning or construction.

§ 1386.13 Federal share.

(a) Except as provided for in paragraph (b) of this section, the Federal share for a State may not exceed 75 per centum of the expenditures incurred by the State under the State plan.

(b) In the case of any project, program, or activity located in an area within a State determined by the Secretary to be an urban or rural poverty area, the Federal share may not exceed 90 per centum of the expenditures incurred by the State under the State plan.

(c) The non-Federal share of any project, program, or activity assisted by a grant under this Subpart may be provided in kind.

(d) For the purpose of determining the Federal share with respect to any activity, program, or project described in the State plan, expenditures on that activity, program, or project by a political subdivision of a State or by a nonprofit private entity shall be deemed to be expenditures by such State, subject to the condition that such expenditures may be included only when made by a political subdivision or nonprofit private agency, organization, or group to which the State agency has made available funds from Federal or State sources for carrying out the approved State plan for the fiscal year.

§ 1386.14 Nonduplication.

In determining the amount of any State's Federal share of the expenditures incurred by it under its approved State plan, there shall be disregarded (a) any portion of such expenditures which are financed by Federal funds provided under any provision of the law other than this subpart, and (b) the amount of any non-Federal funds

required to be expended as a condition of receipt of such Federal funds, except as otherwise provided by statute enacted subsequent to the effective date of Pub. L. 94-103, December 18, 1975.

§ 1386.15 Payments for planning, administration, services, and construction.

(a) From each State's allotment for a fiscal year under this subpart, the State shall be paid the Federal share of the expenditures, other than expenditures for construction, incurred during such year under its State plan approved under this part. Such payments shall be made from time to time in advance on the basis of estimates by the Secretary of the sums the State will expend under the State plan, except that such adjustments as may be necessary shall be made on account of previously made underpayments or overpayments under this section.

(b)(1) Payments for construction projects shall be made upon certification by the designated State agency for construction that, based upon its inspection, work has been performed upon a project, or purchases have been made in accordance with plans and specifications approved by the State agency and payment of an installment is due. If the State is not authorized by law to make payments to the applicant, the payment shall be made directly to the applicant. Certification shall be submitted to the Secretary in such form and at such time as required. Final payment for a project shall be made only upon certification by the State agency authorized by State law and designated by the Governor to administer construction grants that appropriate, periodic, and final inspections have been made by appropriate authorities in the State and that all applicable construction standards and other applicable standards and codes have been met.

(2) If the Secretary, after investigation or otherwise, has reason to believe that any act (or failure to act) has occurred requiring withholding of payments (§ 1386.16) payment may be withheld in whole or in part, pending corrective action or action based on such hearing, after notice has been

given to the designated State agency of opportunity for a hearing.

§ 1386.16 Withholding of payments.

(a) Whenever the Secretary, after reasonable notice and opportunity for hearing to the State council and the appropriate State agency(ies), finds that (1) there is a failure to comply substantially with any of the provisions required to be included in the State plan; (2) there is a failure to comply substantially with any regulations of the Secretary which are applicable to this Part, the Secretary shall notify such State council and agency(ies) that further payments will not be made to the State under this Subpart (or, in his discretion, that further payments will not be made to the State for activities in which there is such failure) until he is satisfied that there will no longer be such failure. Until he is so satisfied, the Secretary shall make no further payment under this Subpart to the State or shall limit further payment under this subpart to such State to activities in which there is no such failure.

(b) The State council shall review, at least annually, the State's plan (including the design for implementation) and the actions of the State for the purpose of determining if the State is complying with the requirements of the State plan and its design for implementation and shall notify the Secretary that it has made such a review. The State council may notify the Secretary of the findings of such review.

§ 1386.17 Standards for services and construction of facilities.

(a) Standards for services for persons with developmental disabilities. (Reserved).

(b) Standards for construction and equipment of facilities.

(1) *General.* (i) The standards set forth in this section shall apply to all projects receiving Federal assistance under Subpart A, Part 1386 and Subpart A, Part 1387 of this chapter for construction of new buildings, acquisition, modernization, expansion, remodeling, and alteration of existing buildings and initial equipment for such buildings.

(ii) The designated State agency for construction shall determine in writing the occupancy classification of the building under the Life Safety Code (National Fire Protection Association (NFPA) Bulletin No. 101) 1973 edition or such future revisions as may be approved by the Secretary, to ensure the capability of building occupants to respond in emergencies and for self-preservation.

(iii) The site location of any facility shall meet the criteria established by the State agency designated for construction, and comply with the Department's requirements with regard to the National Environmental Policy Act, Pub. L. 91-190, National Historical Preservation Act, Pub. L. 89-665, Coastal Zone Management Act, Pub. L. 92-583, and National Archeological Preservation Act, Pub. L. 93-291.

(2) *Design and construction of facilities.* (i) Project design and construction of facilities shall be done in accordance with one of the following model codes:

The Building Officials Conference of America (BOCA),
The Uniform Building Code (UBC)
The Southern Standard Building Code (SSBC)
The National Building Code (NBC)

(ii) The codes listed below shall be used with respect to the following specific details:

Life safety. The National Fire Protection Association (NFPA), The Life Safety Code, Bulletin No. 101;
Air conditioning and ventilation systems. NFPA Standards, Nos. 90A or 90B;
Plumbing. National Standard Plumbing Code (NAPICC).
Electrical systems—National Electrical Code, NFPA Standard No. 70.
Elevators. American Standard Safety Code for Elevators, Dumbwaiters, and Escalators, ASA A17 1960.

(3) *Special details.* (i) All doors to toilet rooms and bathrooms shall be equipped with hardware that will permit access in an emergency.

(ii) All paint and applied finishes used in furniture and furnishing shall be free of lead or other materials which may be harmful if ingested by humans, in accordance with Pub. L. 94-317, the Lead-Based Paint Poisoning Prevention Act.

(4) *Equipment.* Initial equipment of the kind and in the quantity necessary shall be provided for the complete functioning of the facility.

(5) *Architectural Barriers.* The building to be constructed, renovated, or modernized will comply with revised standards of the American National Standards Institute, Inc., adopted pursuant to the Architectural Barriers Act of 1968, 42 U.S.C. 4151-4156.

(6) *Hazards Relocation.* The application, facility, and the operation thereof shall comply, as appropriate, with the following:

(i) Uniform Relocation Assistance Act, Pub. L. 91-646.

(ii) Historic Sites—Pub. L. 89-665.

(iii) Flood Insurance—Pub. L. 93-234.

(iv) Flood Hazards Executive Order 11296.

STATE PLAN REQUIREMENTS: METHODS OF ADMINISTRATION

§ 1386.20 Method of administration.

The State plan shall provide for such strategies, policies, and procedures as are necessary for the proper and efficient administration of the State plan. It shall include methods of informing the general public in the State of the kinds and locations of services and facilities which are available under the State plan, and that the State plan is available to interested parties in the State for their information.

§ 1386.21 Personnel administration.

(a) The State plan shall provide that methods of personnel administration will be established and maintained (in the State agencies administering or supervising the administration of the program and in local agencies administering the program) in conformity with the standards for a Merit System of Personnel Administration, 45 CFR Part 70, and any standards prescribed by the U.S. Civil Service Commission pursuant to section 208 of the Intergovernmental Personnel Act of 1970 modifying or superseding such standards.

(b) The State plan shall provide that the State agency will develop and implement an affirmative action plan for equal employment opportunity in all

aspects of personnel administration as specified in 45 CFR 70.4. Equal employment opportunity. The affirmative action plan will provide for specific action steps and timetables to assure equal employment opportunity. This plan shall be made available for review upon request.

§ 1386.22 Fiscal administration.

The State plan shall provide for such fiscal control and fund accounting procedures as may be necessary to assure the proper disbursement of and accounting for funds paid to the State under this Subpart.

§ 1386.23 Special financial and technical assistance to poverty areas.

The State plan shall provide that special financial and technical assistance shall be given to areas of urban or rural poverty in providing services and facilities for persons with developmental disabilities who are residents of such areas.

§ 1386.24 Reports.

The State plan shall provide that the State agency will make such reports in such form and containing such information, and at such time, as the Secretary may require, and will comply with such provisions as he may find necessary to assure the correctness and verification of such reports. These reports include, but are not limited to, (a) the Developmental Disabilities Office's program performance report and (b) financial reports.

§ 1386.25 Methods of evaluation.

(a) The State plan shall describe the methods to be used to assess the effectiveness and accomplishments of the State in meeting the needs of persons with developmental disabilities in the State.

(b) The State plan shall provide for the implementation of an evaluation system in accordance with § 1385.11 of this chapter.

§ 1386.26 Use of volunteers.

The State plan shall provide for the maximum utilization of all available community resources including volunteers serving under the Domestic Volunteer Services Act of 1973 (87 Stat.

394) and other appropriate voluntary organizations. The use of such services shall supplement, but shall not be in lieu of, paid employees.

§ 1386.27 Protection of employees' interests.

The State plan shall provide for fair and equitable arrangements (as determined by the Secretary after consultation with the Secretary of Labor) to protect the interests of employees affected by actions to carry out the plan described in § 1386.42 including arrangements designed to preserve employee rights and benefits and to provide training and retraining of such employees where necessary and arrangements under which maximum efforts will be made to guarantee the employment of such employees.

§ 1386.28 Membership of State planning council.

The State plan shall contain a current listing of the members of the State council, their names, and the constituency, agency, or organization each represents.

§ 1386.29 Identification of State planning council staff.

The State plan shall (a) provide that the State council will be adequately staffed, consistent with its duties and responsibilities; (b) identify the staff assigned to the council; and (c) specify that the staff shall be responsible to the State council.

§ 1386.30 Review of all other State plans.

The State plan shall provide, to the maximum extent feasible, for an opportunity for prior review and comment by the State council of all State plans of the State which relate to programs affecting persons with developmental disabilities. The State council's responsibilities in obtaining timely access to these other State plans, and the council's recourse if the plans are not made available will be detailed in guidelines to be issued by the Secretary.

§ 1386.31 Review of State plan.

The State plan shall provide that the State council will from time to time, but not less often than annually,

review and evaluate its State plan approved under this subpart and submit appropriate revisions to the Secretary.

PROVISION OF SERVICES AND CONSTRUCTION OF FACILITIES

§ 1386.40 Goals and objectives.

The State plan shall describe clearly defined long-range goals and measurable short-term objectives, with primary consideration given to §§ 1386.42 through 1386.45 and to goals which may be established by the Secretary.

§ 1386.41 Allocation of grant funds based on State priorities.

(a) The State plan shall set forth priorities, policies, and procedures for the allocation and expenditure of funds under the plan, based on the established goals and objectives.

(b) Special consideration shall be given to those activities (1) which are located in areas of urban or rural poverty, or (2) which provide services to the more severely handicapped persons.

(c) The State plan shall provide that high priority for approval shall be given to those activities that hold significant promise toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of individuals with such a disability.

§ 1386.42 Deinstitutionalization.

The State plan goals, objectives, and strategies shall address: (a) The elimination of inappropriate placement in institutions of persons with developmental disabilities, and (b) the improvement of the quality of care and the state of surroundings of persons who are appropriately placed in institutions.

§ 1386.43 Establishment of community program alternatives to institutionalization.

The State plan shall support the establishment of community programs as alternatives to institutionalization and support such programs designed to provide services for the care and habilitation of persons with developmental disabilities, and which utilize, to the maximum extent feasible, the re-

sources and personnel in related community programs to assure full coordination with such programs and to assure the provision of appropriate supplemental health, educational, or social services for persons with developmental disabilities.

§ 1386.14 Early screening, diagnosis, and evaluation.

The State plan shall provide for early screening, diagnosis, and evaluation (including maternal care, developmental screening, home care, infant and preschool stimulation programs, and parent counseling and training) of developmentally disabled infants and preschool children, particularly those with multiple handicaps.

§ 1386.15 Counseling, program coordination, advocacy, follow-along, and protective services.

The State plan shall provide for counseling, program coordination, follow-along services, protective services, and personal advocacy on behalf of developmentally disabled adults.

§ 1386.16 Quality, extent, and scope of services being provided or to be provided.

(a) The State plan shall describe the quality, extent, and scope of services being provided, or to be provided, in implementing the State plan, under such other State plans for Federally assisted State programs as may be specified by the Secretary, but in any case including the following Federally assisted programs: Education for the handicapped, vocational rehabilitation, public assistance, medical assistance, social services, maternal and child health, crippled children's services, and comprehensive health and mental health plans.

(b) The State plan shall describe the quality, extent, and scope of treatment, services, and habilitation being provided or to be provided in implementing the State plan to person with developmental disabilities from funds under this part.

(1) *Quality.* The State plan shall provide that services and facilities furnished under the State plan for persons with developmental disabilities

will be in accordance with the standards set forth in § 1386.17.

(2) *Extent.* The State plan shall describe the extent of services to be provided under the plan including: (i) The kinds of needs to be met, and individuals to be served (such as type and severity of disabilities, age groups, economic status), (ii) the geographic location, distribution, and accessibility of services, and (iii) other relevant factors.

(3) *Scope.* The State plan shall describe the scope of the services to be provided, taking into account Federally-aided State and local programs involved, manpower, and financial resources, and other factors, directed toward the alleviation of developmental disabilities, or toward the social, personal, physical or economic habilitation, or rehabilitation of individuals with such disabilities.

(c) The State plan shall describe how Federal funds allotted to the State will be used to complement and augment rather than duplicate or replace services and facilities which are eligible for Federal assistance under other State programs.

§ 1386.17 Habilitation plans.

For the purpose of complying with the assurance regarding individual habilitation plans (§ 1386.1(b)(5)(x)), the State plan shall describe the methods to be used to facilitate an annual review of the individual plans. The State plan shall also describe the requirements of the habilitation plan which shall include at least the following:

(a) The plan shall be in writing.

(b) The plan shall be developed jointly by (1) a representative(s) of the program primarily responsible for delivering or coordinating the delivery of services to the person for whom the plan is established, (2) such person, and (3) where appropriate, such person's parents or guardian or other representative.

(c) Such plan shall contain a statement of the long-term habilitation goals for the person and the intermediate habilitation objectives relating to the attainment of such goals. Such objectives shall be stated specifically and in sequence and shall be expressed

in behavioral or other terms that provide measurable indices of progress. The plan shall (1) describe how the objectives will be achieved and the barriers that might interfere with the achievement of them, (2) state objective criteria and an evaluation procedure and schedule for determining whether such goals and objectives are being achieved, and (3) provide for a program coordinator who will be responsible for the implementation of the plan.

(d) The plan shall contain a statement (in readily understandable form) of specific habilitation services to be provided, shall identify each agency which will deliver such services, shall describe the personnel (and their qualifications) necessary for the provision of such services, and shall specify the date of the initiation of each service to be provided and the anticipated duration of each such service.

(e) The plan shall specify the role and objectives of all parties to the implementation of the plan.

(f) Each habilitation plan shall be reviewed at least annually by the agency primarily responsible for the delivery of services to the person for whom the plan was established or responsible for the coordination of the delivery of services to such person. In the course of the review, such person and the person's parents or guardian or other representative shall be given an opportunity to review such plan and to participate in its revision.

§ 1386.48 Program for construction of facilities.

When a specific portion of the State's allotment is set aside for construction, the State plan shall provide for the development of a program of construction, renovation, or modernization of facilities for the provision of services for persons with developmental disabilities. Such a program shall (a) be based on a statewide inventory of existing facilities and a survey of need; (b) set forth the relative need in accordance with § 1386.41; (c) assign priority to the construction of projects in order of relative need insofar as funds are available for costs of construction and costs of maintenance and operation of such projects.

§ 1386.49 Opportunity for appeal and hearing.

The State plan shall provide for an opportunity for appeal to and hearing before the State agency for construction to every applicant for a construction project who is dissatisfied with any action of the State agency for construction regarding its application.

DESIGN FOR IMPLEMENTATION

§ 1386.50 Design for implementation of State plan.

(a) The State plan shall contain a design for implementation which shall include (1) details of the methods to be used to implement the State plan, (2) specific objectives to achieve the goals set forth in the State plan, (3) a listing of the programs and resources to be used to meet such objectives, (4) priorities for spending of funds provided under this Subpart, (5) a detailed plan for the use of such funds, and (6) a method for periodic evaluation of the design's effectiveness in meeting such objectives.

(b) The designated State agency is responsible for selecting from alternative strategies those best methods which will achieve the goals and annual objectives as developed by the State council. The design for implementation shall identify the programs and activities related to each of the objectives set forth in accordance with §§ 1386.40 through 1386.45 and the amount of funds allocated to each objective. The expenses of the State council are to be included in the design for implementation.

(c) The design for implementation is to be submitted annually as part of the annual State plan revision. Revisions to the design for implementation may be made as necessary by the designated State administering agency and shall be approved by the State council prior to submission to the Secretary.

Subpart B—State Planning Council

§ 1386.60 Role of State planning council.

The role of the State council is to supervise the development of and approve the State plan prepared by the

designated State agency(ies) by providing guidance through the establishment of goals and objectives, identification of gaps, and the setting of priorities for the allocation of funds. In order to establish credible goals, the State council shall be responsible for needs assessment, analysis of programs currently and potentially capable of providing services to the developmentally disabled, and establishment of priorities to deal with identified gaps. The State council shall establish methods for monitoring and evaluating the implementation of the State plan to ensure that established goals and objectives are being achieved.

§ 1386.61 Establishment of State planning council

(a) Each State which receives assistance under this part shall establish a State council which will serve as an advocate for persons with developmental disabilities. The members shall be appointed by the Governor of the State.

(b) Membership. Each State planning council shall at all times include in its membership representatives of the principal State agencies, local agencies, and nongovernmental agencies, and groups concerned with services to persons with developmental disabilities. As a minimum, the following Federal/State programs must be represented by the State agency membership on the council: Education of the handicapped, vocational rehabilitation, public assistance, medical assistance, social services, maternal and child health, crippled children's services, comprehensive health planning, and mental health. At least one-third of the membership of such a council shall consist of persons with developmental disabilities, or their parents or guardians, who are not officers of an entity, or employees of any State agency or of any other entity, which receives funds or provides services under this part.

[42 FR 5279, Jan 27, 1977, 42 FR 34282, July 5, 1977]

§ 1386.62 Adequate staff.

Each State receiving assistance under this part shall engage for its

State council personnel adequate to insure that the council has the capacity to fulfill its responsibilities and that the staff shall be responsible to the State council.

§ 1386.63 Duties of the State planning council.

The State council shall —

(a) Supervise the development of and approve the State plan required by this part;

(b) Monitor and evaluate the implementation of such State plan;

(c) To the maximum extent feasible, review and comment on all State plans in the State which relate to programs affecting persons with developmental disabilities;

(d) Submit to the Secretary, through the Governor, such periodic reports as the Secretary may reasonably request; and

(e) Submit revisions of the State plan to the Secretary.

Subpart C—Protection and Advocacy of Individual Rights

§ 1386.70 State system for protection and advocacy of individual rights.

(a) As a condition to a State's receiving an allotment under Subpart A of this part, the State shall provide assurances satisfactory to the Secretary that not later than October 1, 1977, (1) the State will have in effect a system to protect and advocate the rights of persons with developmental disabilities, (2) such system will have the authority to pursue legal, administrative, and other appropriate remedies to insure the protection of the rights of such persons who are receiving treatment, services, or habilitation within the State, and (3) such system will be independent of any State agency which provides treatment, services, or habilitation to persons with developmental disabilities. The Secretary shall not make an allotment under Subpart A of this part to a State for any fiscal year beginning after September 30, 1977, unless the State has in effect such a system.

(b) The Governor shall designate the agency responsible for administering the protection and advocacy

System and shall approve the advocacy plan prior to the approval of the Secretary. Such plan is to be submitted in accordance with this section and guidelines established by the Secretary.

(c) The allotment to the State shall be computed in accordance with § 1386.10 (a), (b) except that the allotment to a State in any fiscal year shall not be less than \$20,000.

Subpart D—Practice and Procedure for Hearings to States on Conformity of Developmental Disabilities Plans to Federal Requirements

GENERAL

§ 1386.80 Definitions.

For purposes of this Subpart only:

(a) The term "DDO" means Developmental Disabilities Office.

(b) The term "designee" means any other individual so designated by the Secretary's delegate.

(c) The term "Secretary" means the Secretary of the Department of Health, Education, and Welfare.

(d) The term "Secretary's delegate" means the Assistant Secretary for Human Development, or the Director, Developmental Disabilities Office.

§ 1386.81 Scope of rules.

(a) The rules of procedure in this Subpart govern the practice for hearings afforded by the Department to States pursuant to § 1386.2 or § 1386.16, and the practice relating to decisions upon such hearings.

(b) Nothing in this part is intended to preclude or limit negotiations between the Department and the State, whether before, during, or after the hearing to resolve the issues which are, or otherwise would be, considered at the hearing. Such negotiations and resolution of issues are not part of the hearing, and are not governed by the rules in this subpart, except as expressly provided herein.

§ 1386.82 Records to be public.

All pleadings, correspondence, exhibits, transcripts of testimony, exceptions, briefs, decisions, and other documents filed in the docket in any proceeding may be inspected and copied

in the office of the DDO Hearing Clerk. Inquiries may be made at the Central Information Center, Department of Health, Education, and Welfare, 330 Independence Avenue S.W., Washington, D.C. 20201.

§ 1386.83 Use of gender and number.

As used in this part, words importing the singular number may extend and be applied to several persons or things, and vice versa. Words importing the masculine gender may be applied to females or organizations.

§ 1386.84 Suspension of rules.

Upon notice to all parties, the Secretary's delegate or the presiding officer, with respect to matters pending before him and within his jurisdiction, may modify or waive any rule in this part, unless otherwise expressly provided, upon determination that no party will be unduly prejudiced and the ends of justice will thereby be served.

§ 1386.85 Filing and service of papers.

(a) All papers in the proceedings shall be filed with the DDO Hearing Clerk in an original and two copies. Originals only of exhibits and transcripts of testimony need be filed.

(b) All papers in the proceedings shall be served on all parties by personal delivery or by mail. Service on the party's designated representative will be deemed service upon the party.

PRELIMINARY MATTERS—NOTICE AND PARTIES

§ 1386.90 Notice of hearing or opportunity for hearing.

Proceedings are commenced by mailing a notice of hearing or opportunity for hearing from the Secretary's delegate to the State council and the designated State agency. The notice shall state the time and place for the hearing, and the issues which will be considered, and shall be published in the FEDERAL REGISTER.

§ 1386.91 Time of hearing.

The hearing shall be scheduled not less than 30 days nor more than 60 days after the date notice of the hearing is furnished to the State.

§ 1386.92 Place.

The hearing shall be held in the city in which the regional office of the Department is located or in such other place as is fixed by the Secretary's delegate in light of the circumstances of the case, with due regard for the convenience and necessity of the parties or their representatives.

§ 1386.93 Issues at hearing.

(a) The Secretary's delegate may, prior to a hearing under § 1386.2 or § 1386.16, notify the State in writing of additional issues which will be considered at the hearing, and such notice shall be published in the FEDERAL REGISTER. If such notice is furnished to the State less than 20 days before the date of the hearing, the State or any other party, at its request, shall be granted a postponement of the hearing to a date 20 days after such notice was furnished, or such later date as may be agreed to by the Secretary's delegate.

(b) If, as a result of negotiations between the Department and the State, the submission of a plan amendment, a change in the State program or other actions by the State, any issue is resolved in whole or in part, but new or modified issues are presented, as specified by the Secretary's delegate, the hearing shall proceed on such new or modified issues.

(c) (1) If at any time, whether prior to during or after the hearing the Secretary's delegate finds that the State has come into compliance with Federal requirements on any issue in whole or in part he shall remove such issue from the proceedings in whole or in part as may be appropriate. If all issues are removed he shall terminate the hearing.

(2) Prior to the removal of any issue from the hearing in whole or in part the Secretary's delegate shall provide all parties other than the Department and the State (see § 1386.94(b)) with the statement of his intention and the reasons therefor and a copy of the proposed State plan provision on which the State and he have settled and the parties shall have opportunity to submit in writing within 15 days, for the consideration of the Secretary's delegate and for the record,

their views as to, or any information bearing upon, the merits of the proposed plan provision and the merits of the reasons of the Secretary's delegate for removing the issue from the hearing.

(d) The issues considered at the hearing shall be limited to those issues of which the State is notified as provided in § 1386.90 and paragraph (a) of this section, and new or modified issues described in paragraph (b) of this section, and shall not include issues or parts of issues removed from the proceedings pursuant to paragraph (c) of this section.

§ 1386.94 Request to participate in hearing.

(a) The Department and the State council and the designated State agency are parties to the hearing without making a specific request to participate.

(b) (1) Other individuals or groups may be recognized as parties, if the issues to be considered at the hearing have caused them injury and their interest is within the zone of interests to be protected by the governing Federal statute.

(2) Any individual or group wishing to participate as a party shall file a petition with the DDO Hearing Clerk within 15 days after notice of the hearing has been published in the FEDERAL REGISTER, and shall serve a copy on each party of record at that time in accordance with § 1386.85(b). Such petition shall concisely state (i) petitioner's interest in the proceeding, (ii) who will appear for petitioner, (iii) the issues on which petitioner wishes to participate, and (iv) whether petitioner intends to present witnesses.

(3) Any party may, within 5 days of receipt of such petition, file comments thereon.

(4) The presiding officer shall promptly determine whether each petitioner has the requisite interest in the proceedings and shall permit or deny participation accordingly. Where petitions to participate as parties are made by individuals or groups with common interests, the presiding officer may request all such petitioners to designate a single representative, or he may recognize one or more of such pe-

petitioners to represent all such petitioners. The presiding officer shall give each petitioner written notice of the decision on his petition, and if the petition is denied, he shall briefly state the grounds for denial.

(c)(1) Any interested person or organization wishing to participate as amicus curiae shall file a petition with the DDO Hearing Clerk before the commencement of the hearing. Such petition shall concisely state (i) the petitioner's interest in the hearing, (ii) who will represent the petitioner, and (iii) the issues on which petitioner intends to present argument. The presiding officer may grant the petition if he finds that the petitioner has a legitimate interest in the proceedings, that such participation will not unduly delay the outcome and may contribute materially to the proper disposition of the issues. An amicus curiae is not a party but may participate as provided in this paragraph.

(2) An amicus curiae may present a brief oral statement at the hearing, at the point in the proceedings specified by the presiding officer. He may submit a written statement of position to the presiding officer prior to the beginning of a hearing, and shall serve a copy on each party. He may also submit a brief or written statement at such time as the parties submit briefs, and shall serve a copy on each party.

HEARING PROCEDURES

§ 1386.100 Who presides.

(a) The presiding officer at a hearing shall be the Secretary's delegate or his designee.

(b) The designation of the presiding officer shall be in writing. A copy of the designation shall be served on all parties.

§ 1386.101 Authority of presiding officer.

(a) The presiding officer shall have the duty to conduct a fair hearing, to avoid delay, maintain order, and make a record of the proceedings. He shall have all powers necessary to accomplish these ends, including, but not limited to, the power to:

(1) Change the date, time, and place of the hearing, upon due notice to the parties. This includes the power to

continue the hearing in whole or in part.

(2) Hold conferences to settle or simplify the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding.

(3) Regulate participation of parties and amici curiae and require parties and amici curiae to state their position with respect to the various issues in the proceeding.

(4) Administer oaths and affirmations.

(5) Rule on motions and other procedural items on matters pending before him, including issuance of protective orders or other relief to a party against whom discovery is sought.

(6) Regulate the course of the hearing and conduct of counsel therein.

(7) Examine witnesses.

(8) Receive, rule on, exclude, or limit evidence or discovery.

(9) Fix the time for filing motions, petitions, briefs, or other items in matters pending before him.

(10) If the presiding officer is the Secretary's delegate, make a final decision.

(11) If the presiding officer is a hearing examiner, certify the entire record including his recommended findings and proposed decision to the Secretary's delegate.

(12) Take any action authorized by the rules in this part or in conformance with the provisions of 5 U.S.C. 551-559.

(b) The presiding officer does not have authority to compel by subpoena the production of witnesses, papers, or other evidence.

(c) If the presiding officer is a hearing examiner, his authority pertains to the issues of compliance by a State with Federal requirements which are to be considered at the hearing, and does not extend to the question of whether, in case of any noncompliance, Federal payments will not be made in respect to the entire State plan or will be limited to categories under or parts of the State plan affected by such noncompliance.

§ 1386.102 Rights of parties.

All parties may:

(a) Appear by counsel or other authorized representative, in all hearing proceedings.

(b) Participate in any prehearing conference held by the presiding officer.

(c) Agree to stipulations as to facts which will be made a part of the record.

(d) Make opening statements at the hearing.

(e) Present relevant evidence on the issues at the hearing.

(f) Present witnesses who then must be available for cross examination by all other parties.

(g) Present oral arguments at the hearing.

(h) Submit written briefs, proposed findings of fact, and proposed conclusions of law, after the hearing.

§ 1386.103 Discovery

The Department and any party named in the Notice issued pursuant to § 1386.90 shall have the right to conduct discovery (including depositions) against opposing parties. Rules 26-37 of the Federal Rules of Civil Procedure shall apply to such proceedings; there will be no fixed rule on priority of discovery. Upon written motion, the presiding officer shall promptly rule upon any objection to such discovery action initiated pursuant to this section. The presiding officer shall also have the power to grant a protective order or relief to any party against whom discovery is sought and to restrict or control discovery so as to prevent undue delay in the conduct of the hearing. Upon the failure of any party to make discovery, the presiding officer may, in his discretion, issue any order and impose any sanction (other than contempt orders) authorized by Rule 37 of the Federal Rules of Civil Procedure.

§ 1386.104 Evidentiary purpose.

The hearing is directed to receiving factual evidence and expert opinion testimony related to the issues in the proceeding. Argument will not be received in evidence; rather it should be presented in statements, memoranda, or briefs, as determined by the presiding officer. Brief opening statements, which shall be limited to statement of

the party's position and what he intends to prove, may be made at hearings.

§ 1386.105 Evidence.

(a) *Testimony.* Testimony shall be given orally under oath or affirmation by witnesses at the hearing. Witnesses shall be available at the hearing for cross-examination by all parties.

(b) *Stipulations and exhibits.* Two or more parties may agree to stipulations of fact. Such stipulations, or any exhibit proposed by any party, shall be exchanged at the prehearing conference or otherwise prior to the hearing if the presiding officer so requires.

(c) *Rules of evidence.* Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the presiding officer. A witness may be cross-examined on any matter material to the proceeding without regard to the scope of his direct examination. The presiding officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues.

§ 1386.106 Exclusion from hearing for misconduct.

Disrespectful, disorderly, or contemptuous language or contemptuous conduct, refusal to comply with directions, or continued use of dilatory tactics by any person at the hearing before a presiding officer shall constitute grounds for immediate exclusion of such person from the hearing by the presiding officer.

§ 1386.107 Unsponsored written material.

Letters expressing views or urging action and other unsponsored written material regarding matters in issue in a hearing will be placed in the correspondence section of the docket of the proceeding. These data are not

deemed part of the evidence or record in the hearing.

§ 1386.108 Official transcript.

The Department will designate the official reporter for all hearings. The official transcripts of testimony taken, together with any stipulations, exhibits, briefs, or memoranda of law filed therewith shall be filed with the Department. Transcripts of testimony in hearings may be obtained from the official reporter by the parties and the public at rates not to exceed the maximum rates fixed by the contract between the Department and the reporter. Upon notice to all parties, the presiding officer may authorize corrections to the transcript which involve matters of substance.

§ 1386.109 Record for decision.

The transcript of testimony, exhibits, and all papers and requests filed in the proceedings, except the correspondence section of the docket, including rulings and any recommended or initial decision shall constitute the exclusive record for decision.

POSTHEARING PROCEDURES, DECISIONS

§ 1386.110 Posthearing briefs.

The presiding officer shall fix the time for filing posthearing briefs which shall not exceed 20 days after termination of the hearing. Such briefs may contain proposed findings of fact and conclusions of law, and, if permitted, reply briefs.

§ 1386.111 Decisions following hearing.

(a) If the Secretary's delegate is the presiding officer, he shall, when the time for submission of posthearing briefs has expired, issue his decision within 60 days.

(b)(1) If a hearing examiner is the presiding officer, he shall, within 30 days of the time for submission of posthearing briefs has expired, certify the entire record, including his recommended findings and proposed decision, to the Secretary's delegate. The Secretary's delegate shall serve a copy of the recommended findings and proposed decision upon all parties, and amend, if any.

(2) Any party may, within 20 days, file with the Secretary's delegate exceptions to the recommended findings and proposed decision and a supporting brief or statement.

(3) The Secretary's delegate shall thereupon review the recommended decision and, within 60 days of its issuance, issue his own decision.

(c) If the Secretary's delegate concludes,

(1) In the case of a hearing under § 1386.2, that a State plan does not comply with Federal requirements, he shall also specify whether the State's total allotment for the fiscal year will not be authorized for the State or whether, in the exercise of his discretion, the allotment will be limited to categories under or parts of the State plan not affected by such noncompliance;

(2) In the case of a hearing pursuant to § 1386.16, that the State is not complying with requirements of the State plan he shall also specify whether further payments will not be made to the State or whether, in the exercise of his discretion, payments will be limited to categories under or parts of the State plan not affected by such noncompliance. The Secretary's delegate may ask the parties for recommendations or briefs or may hold conferences of the parties on these questions.

(d) The decision of the Secretary's delegate under this section shall be the final decision of the Secretary and shall constitute "final agency action" within the meaning of 5 U.S.C. 704 and the "Secretary's action" within the meaning of section 138 of the Act. The Secretary's delegate's decision shall be promptly served on all parties, and amend, if any.

§ 1386.112 Effective date of decision by Secretary's delegate.

(a) If, in the case of a hearing pursuant to § 1386.2, the Secretary's delegate concludes that a State plan does not comply with Federal requirements, and his decision provides that the allotment will be authorized but limited to categories under or parts of the State plan not affected by such noncompliance, his decision shall

§ 1387.1

specify the effective date for the authorization of the allotment.

(b) If, in the case of a hearing pursuant to § 1386.16, the Secretary's delegate concludes that the State is not complying with requirements of the State plan, his decision that further payments will not be made to the State, or payments will be limited to categories under or parts of the State plan not affected, shall specify the effective date for the withholding of Federal funds.

(c) The effective date shall not be earlier than the date of the decision of the Secretary's delegate and shall not be later than the first day of the next calendar quarter.

(d) The provisions of this section may not be waived pursuant to § 1386.84.

PROPOSED REGULATIONS
DEVELOPMENTAL DISABILITIES ACT OF 1978

From: 45 Fed. Reg. 31006 (May 9, 1980)

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DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of Human Development Services

45 CFR Parts 1385, 1386, and 1387

Developmental Disabilities Program

AGENCY: Department of Health, Education, and Welfare, Office of Human Development Services (HDS), Rehabilitation Services Administration (RSA).

ACTION: Notice of proposed rulemaking.

SUMMARY: The Rehabilitation Services Administration (RSA) in HDS proposes new and revised regulations. The basis for these regulations is the Developmental Disabilities legislation. In these proposed rules, RSA is also revising and clarifying the current policies and regulations that will have continued applicability. The proposed rules do not include regulations for the university affiliated facilities program, which have been issued separately under 45 CFR Part 1388 (August 6, 1979, Vol. 44, No. 152), except for a new requirement for an assurance regarding the rights of persons with developmental disabilities.

DATE: Comments on the proposed rulemaking must be received on or before August 7, 1980.

ADDRESS: Comments should be addressed to Commissioner, Rehabilitation Services Administration, U.S. Department of Health, Education, and Welfare, Washington, D.C. 20201. Comments are available for public inspection in the Bureau of Developmental Disabilities, RSA, Room 3070, Mary E. Switzer Building, 330 C Street S.W., Washington, D.C. 20201, Monday through Friday, 8:30 a.m. to 5:00 p.m., telephone (202) 245-0335.

FOR FURTHER INFORMATION CONTACT: Ms. Marjorie Kirkland, Bureau of Developmental Disabilities, Washington, D.C. 20201, Telephone: (202) 245-0335.

SUPPLEMENTARY INFORMATION:

General

We are proposing new regulations to implement Title V of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, as well as to meet additional needs of the program which have become apparent. The title of the new Act is the Developmental Disabilities Assistance and Bill of Rights Act. It provides for a three-year extension of the authorizations of

appropriations for: (1) The basic State program; (2) systems for protection and advocacy of individual rights; (3) the university affiliated facilities programs for administration and operation of training and service programs; and (4) special project grants including projects of national significance. The following seven sections present the major changes made to the developmental disabilities programs by the 1978 amendments. The policies and purposes of the changes are discussed in the section-by-section analysis of the proposed regulations.

Parts of the Rehabilitation Services Administration will soon be transferred to the new Department of Education; the Developmental Disabilities Office will remain in the Department which will become the Department of Health and Human Services. Changes resulting from the reorganization will be made in the final regulations.

Definition of Developmental Disability

A major change brought about by the 1978 amendments is in the definition of developmental disability. The new definition is based on a study mandated by Pub. L. 94-103. It states that a developmental disability: (1) is severe and chronic; (2) is attributable to a mental or physical impairment; (3) is manifested before age 22; (4) is expected to continue indefinitely; (5) results in substantial functional limitation in three of seven specified areas of major life activities; and (6) reflects the need for lifelong and individually planned services.

The House Conference Report No. 95-1789, accompanying H.R. 12487, p. 104, 95th Congress, Second Session, noted that "the definition is intended to cover everyone currently covered under the definition and it is also intended to add other individuals with similar characteristics. . . . It is not the intent to exclude anyone who legitimately should have been included under the definition in current law."

Rights of the Developmentally Disabled

Section 111 of Pub. L. 94-103 contained a series of "findings" respecting the rights of developmentally disabled persons, including the following:

- (1) Persons with developmental disabilities have a right to appropriate treatment for their disabilities;
- (2) Treatment should be designed to maximize the developmental potential of the person;
- (3) The Federal government and the States both have an obligation to assure that public funds are not provided to any institutional or other residential

program for persons with developmental disabilities that does not meet certain stated standards;

(4) Nonresidential programs must be appropriate to the persons served.

No authority was included in that Act to allow the Department to withhold funds from States on the basis of failure to meet the findings.

The 1978 amendments, however, added a requirement to the basic State grant program that the State assure the Secretary that the rights of developmentally disabled people are to be protected consistent with Sec. 111. The Department has decided to require that all programs authorized under the Act, except for the protection and advocacy systems, comply with Sec. 111 of the Act. The protection and advocacy systems are exempted because they are an extension of the "Rights" provisions and the systems do not provide services, treatment or habilitation. The Department believes that applying this policy to the other programs is within the intent of Congress. Recipients of funds under the Act are to assure the State and the Commissioner that they will provide services which comply with the requirements of Sec. 111 (Rights). Failure to comply with the assurance may result in the loss of Federal funds.

Protection and Advocacy Systems

The 1978 amendments made several changes in the protection and advocacy provisions. They are a prohibition against the State planning council's administration of the State's system; a requirement that a report describing the State's activities be submitted to the Secretary at least once every three years; and a requirement that a program performance report be submitted annually. Failure to have an approvable system in place will result in the loss of Federal funds for the basic State grant program as well as for the protection and advocacy system. Minimum allotments of \$50,000 are established for the States.

State Planning Councils

Several changes in the Act affect State planning councils. One-half, instead of one-third, of the members are to be consumers and their representatives. The principal State agencies represented on the council remain the same as in the prior Act, but in addition, higher education training facilities and local agencies must now be represented. The Governor is to appoint all members and provide for appropriate rotation of the members.

The State council is so constituted that it provides a forum for consumer

involvement in policy and priority determinations.

The council also provides a means for exploring all avenues for the provision of services through State and local, private, and public agencies. Unlike the prior system the council must now develop the State plan jointly with the administering agency.

State Plan

The major part of the Developmental Disabilities Program is the basic State plan. In 1970, the program was seen as a planning and coordinating mechanism, with some funds for augmenting services provided by other agencies. The amendments of 1978 have to a considerable degree, changed the programs to provide services. The priority service areas are: (a) case management; (b) child development; (c) alternative community living arrangements; and (d) non-vocational social-development.

The Act provides that until the appropriation exceeds \$60 million a year, a State is required to fund at least one, but not more than two, priority service areas. The State may fund three priority service areas when the Federal appropriation is more than \$60 million. Regardless of the Federal appropriation, however, the State must spend at least 65 percent or \$100,000 (whichever is greater) of its allotment for services.

For those States which would have to reduce the amount of Federal funds spent on planning activities in order to meet these requirements, however, the Act provides a transitional period. Those States need not reduce the amount spent for planning in the fiscal years ending September 30, 1979 and September 30, 1980. By October 1, 1980, however, all States must allocate at least 65 percent for services. These transitional provisions are not included in the regulations because the Department believes they are self-implementing, and because they will soon expire.

The State plan now must be revised at least every three years, instead of annually, as before. It must, however, be reviewed annually by the State council for needed changes in priority service areas. There are now eight major sections of the State plan instead of the 30 previously required.

Allotments

The 1978 amendments increase from \$100,000 to \$250,000 the minimum allotment each State and Puerto Rico may receive for the basic State program. Minimums for the other Territories are increased to \$100,000. The Northern

Mariana Islands may participate in the program if it chooses.

Special Project Grants

New grant authority is available to support the development and demonstration of methods to attract and retain professional personnel to serve developmentally disabled people, and the demonstration of methods to expand or improve protection and advocacy services. The Commissioner is to establish procedures to ensure the involvement of developmentally disabled persons and their parents in the determination of priorities for these grants.

Overview of Regulations

The regulations in these parts are reorganized and rewritten for clarity and simplicity in accordance with HEW's Operation Common Sense.

The following regulations were previously promulgated in 45 CFR parts 1385, 1386, and 1387 and are not changed, but are included in these regulations for the sake of clarity and completeness.

New Location of Regulations Promulgated in 1977, Not Substantively Changed

Present section and title	Proposed section
1385.7—Recovery	1385.6
1385.9—Cooperative or joint effort between States and agencies	1385.5
1385.10—Awards	1385.5
1386.1(b)—Purpose and assurances	1386.46
1386.2(a), (b), (d), (e)—Plan submission and approval	1386.42
1386.3—Designation of State agency(ies) for administration	1386.41
1386.4—Identification of administrative program unit	1386.41(c)
1386.10(a), (b)—Allotments to States	1386.1
1386.11—Reallocation of funds	1386.2
1386.12(d)—Conditions on uses of allotment	1386.9(b)
1386.13—Federal share	1386.6
1386.14—Nonduplication	1386.8
1386.15(a)—Payments for planning administration, services, and construction	1386.9
1386.16(a)—Withholding of payments	1386.11
1386.20—Methods of administration	1386.43
1386.21—Personnel administration	1386.12
1386.22—Fiscal administration	1386.41(e)
1386.23—Special financial and technical assistance to poverty areas	1386.47(f)
1386.24—Reports	1386.41(d)
1386.25(a)—Methods of evaluation	1386.49
1386.26—Use of volunteers	1386.50
1386.47—Habitat plans	1386.52
1386.61—Establishment of State planning council	1386.41
1386.60-112—Subpart D Practice and Procedure for Hearings to States on Conformity of Developmental Disabilities Plans to Federal requirements	1386.60-112
1387.2—Application content	1387.4
1387.3—Eligible applicants	1387.3
1387.20-23—Special project grants	

In proposing the new regulations, we maintain the underlying purpose of the regulations as stated in the Preamble to the Proposed Rules published in the Federal Register on August 30, 1976 (Part II, Vol. 41, No. 169). That purpose is to ensure the continued targeting of funds

and resources to services to developmentally disabled individuals through a national, State, and local partnership. To this end, the goal of the program is to enable States to increase the provision of quality services to persons with developmental disabilities. The goal is to be reached through the design and implementation of a comprehensive and continuing State plan which makes optimal use of Federal, State, local, and private resources, and assures the rights and dignity of all those being served.

The following is a section-by-section analysis of the proposed regulations (The references in parentheses in the headings are to the applicable sections of the Act.)

Part 1385—General

This part sets out the provisions applicable to two or more of the developmental disabilities programs. We believe that this organization will make it easier for members of the public to locate common policies and procedures, and that it will avoid unnecessary duplication.

Section 1385.1 Purpose of the regulations. (Sec. 109)

This section sets forth the purpose of these regulations which is to implement the Act, and to provide operational and administrative information needed by users to understand the requirements and to act appropriately.

Section 1385.2 Definitions. (Sec. 102)

This section includes definitions used in Parts 1386, 1387, and 1388 of this chapter. Terms relating only to construction have been omitted because the Act no longer provides authority for construction activities.

We have quoted the definition of developmental disabilities from the Act without elaboration. Some people have expressed concern that we need to clarify several terms in the definition. For example, "severe disability" and "substantial functional limitation" are subject to varied interpretations, so that one State might find an individual eligible for services under the Act, but another might not. The Department believes that all of the specifications taken together constitute an adequate definition without further definition of the component terms.

We welcome comments regarding problems encountered in using this definition. We are particularly interested to know whether the term "substantial functional limitations" needs to be defined, also whether the seven areas of life activity need further definition. We hope to learn whether the

unelaborated definition will bring about greater ease of planning, administration and programming; and, most of all, if it results in providing services to the developmentally disabled population.

Section 1385.3 Rights of persons with developmental disabilities (Rights). (Sec. 111)

The "Rights of the Developmentally Disabled," which was included in but not implemented by Pub. L. 94-103, is being applied by the Rehabilitation Services Administration in relation to all programs authorized under the Act (except the protection and advocacy program for the reasons stated above in "Rights of the Developmentally Disabled"). However, the 1978 amendments require implementation of the provision. The regulations elaborate on the "Rights" in the following ways: (1) we have added to the list of "rights" standards for compliance with Medicare fire protection requirements. The Medicare standards have been proposed in order to avoid confusion for providers of services and States; (2) we have added standards for nonresidential programs; and (3) we have prohibited the award of State and Federal funds to programs or activities which do not meet the standards. Paragraph (b) provides that each grantee, except for the protection and advocacy program, must give an assurance that no Federal or State funds will be used by any project, program, activity, or facility that does not comply with this section. Failure to comply with this assurance may result in the loss of Federal funding.

Section 1385.4 Grants administration requirements.

This section incorporated 45 CFR Part 74, and other Departmental grants requirements that are applicable to developmental disabilities programs. A new provision has been added providing for a notification and hearing if a specific claim is to be disallowed.

The proposed regulation, in paragraph (c), provides for the first time that States may appeal disallowances to the Departmental Grant Appeals Board. The decision of the Board shall constitute the final agency decision on the disallowances.

Paragraph (d) pertains to the examination of all records of grantees and sub-grantees receiving funds under the Act by authorized representatives of the Secretary or the Comptroller General of the United States. The proposed regulation, although included in 45 CFR Part 74, is added to emphasize the need for access to records, including all records of the protection and advocacy system relating to Federally

funded activities, in order for the Department to carry out its responsibilities and to assure proper use of Federal funds. Some States and agencies have objected to this activity in the past.

Section 1385.5 Awards

Section 1385.6 Recovery of Federal funds used for construction of facilities. (Sec. 107)

No substantive changes are proposed from the present regulations.

Section 1385.7 Assurances regarding evaluation system. (Sec. 110(a))

As a condition to the receipt of Federal funds under the Act beginning October 1, 1980, each State must assure the Commissioner that it will submit a time-phased plan for implementation of a comprehensive system for the evaluation of services to persons with developmental disabilities provided under the Act. By October 1, 1982, the State must also assure the Commissioner that it is using the evaluation system. Failure to do so may result in the loss of Federal funding. Except for a revision of the time schedule for planning and implementation, these provisions are the same as those in present regulations. The Commissioner will issue instructions to the States on planning and implementing the evaluation system.

Part 1386—Formula Grant Programs

The purpose of this part of the proposed regulations is to specify policies and procedures for the conduct of the formula grant programs, including the implementation of the changes in the 1978 amendments. Part 1386 is divided into four subparts. Subpart A contains the general provisions pertaining to one or both of the formula grant programs, except where noted. Subpart B provides details of the requirements of the protection and advocacy system. Subpart C deals with the basic grant program including provisions regarding the State planning councils. Subpart D explains the practices and procedures for hearings when a question of conformity or compliance has been raised.

Subpart A—General

Section 1386.1 Formula for determining allotments. (Sec. 132(a))

No substantive changes are proposed from the present regulations.

Section 1386.2 Allotment for basic grant program. (Sec. 132(a)(2) (A) & (B))

This section informs the States and Territories of the new minimum allotments, increased from \$150,000 to \$250,000 for States, the District of Columbia, and Puerto Rico. The other Territories are to be allotted \$135,000 as a result of this reasoning:

(1) Sec. 132(a)(2)(A) states that the allotment to the Territories may not be less than \$100,000;

(2) Sec. 133(b)(4)(B) states that "not less than \$100,000 or 65 percent * * *, whichever is greater, will be expended (on services * * *) (Emphasis added.)"

(3) In order for the Territories to spend \$100,000 (the greater amount) and still have funds for planning and administration, it is evident that their allotment must be more than \$100,000.

(4) We are allotting 35 percent of \$100,000 to the Territories for planning and administration, or a total of \$135,000 to each.

Section 1386.3 Allotment for protection and advocacy system. (Sec. 113(b)(1)(A))

This section incorporates into the regulations provisions contained in the 1978 amendments for allotments for protection and advocacy systems. This section also establishes a minimum allotment of \$30,000 per year (instead of the previous \$20,000 per year) for Guam, the Commonwealth of the Northern Mariana Islands, American Samoa, the Virgin Islands, and the Trust Territories of the Pacific Islands since minimum allotments were not included in the Act. The Department believes these minimums are essential for those Territories to operate a protection and advocacy system in their areas.

The regulations also provide that in the event the appropriation is less than the amount necessary to make allotments to the States and Territories under the previous paragraph, the State's allotment shall be equal to the ratio which the State's allotment bears to the total amount appropriated.

Section 1386.4 Reallocation. (Sec. 132(d))

Section 1386.5 Cooperative or joint effort between States and between agencies. (Sec. 132(c))

Section 1386.6 Federal and non-Federal shares for the basic State grant program. (Sec. 103)

No substantive changes from the present regulations are proposed.

Section 1386.7 Obligation by grantees and subgrantees.

This new section specifies the period of time during which grantees and subgrantees may obligate funds under the Act.

Section 1386.8 Nonduplication. (Sec. 136)

No substantive changes from the present regulations are proposed.

Section 1386.10 Liquidation of obligations. (Sec. 134)

This new section has been added because the Act (Sec. 134) requires that expenditures be made under the State's current, approved State plan. In the past, funds have sometimes been held for long periods without being used for program purposes. We believe good management practice allows not more than one additional year for liquidating of costs resulting from obligations.

Section 1386.11 Withholding of payments. (Sec. 135)

This section restates the existing regulations. The proposed regulation also extends this provision to the protection and advocacy program. In the previous regulations, this provision inadvertently failed to refer to the protection and advocacy system. We are correcting that omission in this section of the regulations.

Section 1386.12 Standards for a merit system of personnel administration

This section incorporates the standards for a Merit System of Personnel Administration as promulgated by the Office of Personnel Management (OPM). The standards apply to persons employed by State and local governments under the protection and advocacy system and the basic State program funded under Subparts B and C of Part 1386, including the staff of the State planning council. The Department has adopted these standards which were published in the Federal Register, Vol. 44, No. 34, February 16, 1979. They are available from the OPM, and HEW Regional Offices.

Section 1386.13 Fair hearings.

This section sets out a new requirement which is added because of the 1978 amendments' emphasis on the provision of services. The Department believes that all reasonable means must be used to assure: (1) that persons applying for services are not arbitrarily denied them, and (2) that no one receiving services has them terminated

or reduced without a hearing. To accomplish these purposes we have adopted the language used in the regulations for Title XX of the Social Security Act (Social Services). (See 45 CFR 228.14.)

Subpart B—State System for Protection and Advocacy of Individual Rights

As a condition for a State to receive Federal funds for the basic State program, the act requires that the State must have in operation a system to protect and advocate the rights of the developmentally disabled. Failure to meet this requirement may result in the loss of Federal funds under Subparts B and C of this Part and also under Part 1387 (because the State in which a special project is to be carried out must have a State plan approved under Part C).

The Department has had over two years' experience in administering the protection and advocacy program. Based on this experience, it is proposing several new and more detailed regulations.

Section 1386.20 Requirements for participation in the developmental disabilities program. (Sec. 113(a))

The legislative requirements for the system are restated from the Act in order to emphasize their importance. In addition, the regulations clarify the population that is to be served. We do not believe Congress intended to exclude the group most urgently in need of advocacy: those persons with developmental disabilities who are not receiving services. We have, therefore, made "all individuals with developmental disabilities in the State" eligible for assistance by the system.

Section 1386.20(c)(2) requires that protection and advocacy systems have the authority to institute legal and administrative proceedings to redress the rights of institutionalized developmentally disabled persons without the necessity of representing a named client. Exercise of this authority is contingent upon the protection and advocacy system certifying to the court or administrative body that certain steps have been taken in an attempt at non-judicial resolution.

The Department is particularly interested in knowing if there are any state constitutional, statutory or judicial barriers to this provision. If there are, is the state willing to eliminate these barriers? What would such changes entail and how long would they take?

Sections 1386.20(3) and (4) require that protection and advocacy system have access to the medical and personal records of institutionalized

developmentally disabled persons. In the case of judicially declared mentally incompetent individuals, their guardians must be given reasonable notice of the protection and advocacy system's intent to examine the records. If the institutionalized person is not mentally impaired, the protection and advocacy system must obtain that person's consent before being allowed access to the records. However, the protection and advocacy system must establish procedures to protect the confidentiality of the records examined.

The Departmental believes that these provisions are essential and will provide the protection and advocacy systems with the necessary mechanisms to adequately protect the rights of institutionalized developmentally disabled persons.

On the basis of our experience, we have required that the protection and advocacy system have physical access to persons with developmental disabilities who are in any institution or program.

Section 1386.21 Designated State protection and advocacy office. (Sec. 113(a))

This section specifies what the State must do in designating the State's protection and advocacy office and the limitations on its choices. The present policy of allowing States to select public or private nonprofit agencies to carry out the protection and advocacy program is maintained.

Some States have proposed to place the protection and advocacy office in an agency which provides guardianship. The Department considers guardianship a service. Since Sec. 113(a)(2) requires that the protection and advocacy system be independent of any agency which provides services to persons with developmental disabilities, we believe guardianship and protection and advocacy may not be combined. There is a potential conflict in guardianship cases because guardianship arrangements, especially involving adults, impose limitations on the ward's rights. Our policy will be to assume that a conflict exists any time a reasonable question is raised. This policy is necessary in order to best protect the interests of the individuals because of assuring the independence of the system from service providers.

Section 1386.22 Report on the State system. (Sec. 113(a)(3)(A))

This proposed regulation establishes for the first time the kinds of information which the State must include in the statutorily required report to the Commissioner on the protection and

advocacy system. The report must describe the activities to be carried out, including activities to coordinate and cooperate with other protection and advocacy systems in the State, for example, rehabilitation and aging programs.

Section 1386.23 *Submittal of the report on the State system.*

Section 1386.24 *Amendments to the report on the system.*

These sections indicate the manner in which the triennial reports on the system and revisions to the system are to be submitted to and approved by the Governor prior to their being forwarded to the Commissioner for final approval. The basis for these regulations is found in Section 113(a) of the Act.

Section 1386.25 *Annual reports, (Sec. 113(a)(3)(B))*

The new statute requires an annual report describing the activities carried out, and any changes made in the system, during the previous year. The regulation establishes what the annual report must contain. In addition, States must submit annually a proposed budget. The purpose of the regulation is to ensure that the Department has the information necessary to determine if the protection and advocacy program in each State is properly carried out.

Section 1386.26 *Federal financial participation.*

This section sets forth the conditions under which Federal financial participation is available in the cost of services. Subsection (a) states that Federal financial participation is allowable for activities included in the approved reports of the system. Information and referral services are allowable even when provided to persons who are not developmentally disabled. This exemption is made because a large portion of the requests are made by telephone and mail, and under those circumstances it is infeasible to ascertain eligibility.

Subsection (b) lists expenditures in which Federal financial participation is not allowable: those made to liquidate obligations beyond the allowable time; those made on behalf of ineligible persons; those not included in the approved reports; and those made to solve problems which are not related to the person's disability.

The purpose of protection and advocacy systems is to meet the special needs of persons with developmental disabilities which arise because of their disabilities. The Act emphasizes that the system is to protect and advocate the

rights of the system's clients. The system is not intended to meet all the legal and advocacy needs of persons with developmental disabilities. For example, developmentally disabled persons share with the general populace occasional need for assistance in drafting a will, or instituting or defending against a divorce action. These needs do not fall within the role of the protection and advocacy system and thus are not eligible for Federal financial participation.

Section 1386.27 *Prohibition of use of protection and advocacy system funds for lobbying. (Sec. 113(b)(2))*

The statute requires that Section 1913 of Title 18, U.S.C. be applied to the protection and advocacy program. This section of the regulations restates the statutory requirement, and adds that unsolicited communication with members of Congress for the purpose of influencing their actions is prohibited.

Subpart C—State Plan for Provision of Services for Persons With Developmental Disabilities

State Planning Council

The first four sections of this Subpart, § 1386.30 through § 1386.33, deal with the establishment, composition, duties and staff of the State planning council. The purpose of the regulations is to implement the 1978 amendments relating to the council. The new requirements are that: (1) the State planning council must now consist of at least 50 percent consumer representation; and (2) the council must now develop the State plan jointly with the designated State agency. There is no change, however, in the primary role of the State planning council: planning, monitoring, evaluating, and advocating on behalf of all developmentally disabled people. The council chairperson continues to submit the State plan to the Commissioner.

Section 1386.30 *Establishment of the State planning council. (Sec. 137(o)(1))*

This section makes it mandatory for a State to establish a State planning council in order to receive Federal funds.

Section 1386.31 *Makeup of the council. (Sec. 137(o))*

Subsection (a) provides that the Governor appoints all members of the council and makes appropriate provisions for rotation of all members except the representatives of State/Federal programs. The State plan is to include a statement of the State's policies on rotation of the council

members. The policies must provide for continuity among the consumer members and consumer representatives. Representatives of the State/Federal programs must not rotate since they are members of the Governor's cabinet or staff, generally serve at his or her pleasure, and continuously represent their programs.

We decided not to specify which or how many handicapping conditions must be represented on the council because the number is so large that a listing could lead to a council of unmanageable size.

We have specified in subsection (b) the State/Federal program representation on State planning councils because the State planning councils need to have the benefit of information from the various Federally assisted programs. The principal programs are identified in Section 133(b)(2)(B) of the Act. The regulation proposes that each program be represented by an individual who has knowledge of and authority to speak for and act for that program. We believe it is not possible for one or a few individuals to have sufficient knowledge concerning all these programs, and, at the same time, possess the authority to speak for them and to provide the State council with the guidance that Congress intended they provide in making policy decisions. The Department will consider a waiver under § 1386.31(b) upon a showing by the Governor of the State that the State officials appointed do have the experience and authority to speak and act for the programs represented.

Subsections (c) and (d) reflect major changes enacted by the 1978 amendments. Formerly, consumer representatives comprised one-third of the total membership of the council. The new requirement is that at least one-half of the membership of the council consist of a combination of persons who are developmentally disabled and relatives or guardians of such persons. Of this half, at least one-third must be parents, other immediate relatives, or guardians of persons with mentally impairing developmental disabilities; and at least one-third must be consumers—that is, persons who are themselves developmentally disabled.

The Department believes that minorities must be included in the membership of the council.

Subsection (e) restates a part of Sec. 137(a)(2) of the Act. Based on sections 1124(a)(3) and 1128(b) of the Social Security Act (cited in the 1978 amendments), this subsection describes persons who cannot be placed on the council as consumer representatives

The purpose of this requirement is to avoid all possible conflict of interest, and to assure that consumers' concerns are adequately addressed in the council's activities.

Section 1386.32 Duties of the council. (Sec. 137(b) and 145(d))

The purpose of this regulation is to explain the required duties of the council. Subsection (a)(1) states that the council and State agency(ies) shall jointly develop the State plan; subsection (b) requires the council chairperson to submit the State plan and annual review of the priority service areas to the Commissioner. The legislation is silent as to who shall submit the State plan. However, both the Senate and House reports are quite clear that the councils and State agencies are to "work together as equal partners" (Senate Report No. 95-890, page 37, 95th Cong. 2d Session), and "the council is not to replace the State agency as the responsible party for administration of the program" (House Report No. 95-1188, page 13, 95th Cong. 2d Session).

The existing regulation requires that the State plan and other reports be transmitted by the State planning council. The Department is proposing to continue this requirement.

The Department has considered, but rejected, the suggestion that the State plan be submitted to the Department by official representatives of both the State planning council and the State agency as co-signers. The Department is, instead, proposing that both parties sign the State plan indicating that the result is a joint endeavor.

Since enactment of the 1978 amendments requiring "joint development" of the plan by the State planning council and the State agency the Department has become aware of confusion at the State level about the roles of each. The proposed regulation makes clear that "joint development" does not mean that the council and the agency(ies) must agree on all parts of the final plan. When there is disagreement, the Governor will make the decision. Thus, Section 1386.21(a), first paragraph, represents a departure in the role of the councils from past practice. The proposed regulations provide that the State planning councils will set broad policy, determine priority service areas and set goals. This is essentially the same as in the past. However, the proposed regulations require that State plans be developed by the councils jointly with the State agencies which administer the plans. This is consistent with Section 137(b)(1) of the Act, as amended in 1978, which

requires that the plans be jointly developed with the administering agencies, including specification of areas of service.

The Department has interpreted the requirement for joint development to mean that each party has a voice in the adoption of policies, including the selection of priority service areas. This requirement for joint development creates the potential for a deadlock, or an inability to act, if the councils and the agencies cannot resolve differences which may arise between them. To deal with the possibility of a deadlock, the Department believes it necessary to provide a means for resolving any impasses which may arise. The proposed regulations meet this problem of potential impasses by specifying that the Governor of the State will be the one to resolve them.

Paragraphs (2) through (5) set forth other duties and responsibilities of State planning councils. A new requirement is that the council submit an annual report of its activities to the Secretary, through the Governor. This report was previously incorporated in the program performance report.

Subsections (b) and (c) continue existing requirements to assure that plans are submitted in a timely manner, and through proper channels. Subsection (d) repeats the legislative mandate that the State planning council not administer the protection and advocacy system.

Section 1386.33 Council staff. (Sec. 133(b)(1)(A))

Subsection (a) of the proposed regulations implements Section 133(b)(1)(A) of the Act, which requires that the State council have staff responsible to it and adequate to carry out its responsibilities and duties. The Commissioner has determined that a full-time director and a secretary are required in each State. This staff is the minimum for any State, and subsection (b) provides for the many States that will need additional staff, depending on the States' unique needs and resources since government agencies and the public must be able to communicate with the council on a daily basis. The basis for the Commissioner's decision is a report, "Administrative Environment Project," December 1977, developed with a grant from the Department.

State Plan Requirements

The general provisions pertaining to State plans are in § 1386.40 through § 1386.54. These regulations are designed to implement the requirements of Section 133 of the Act in regard to

State plans, and to define further what is required.

Section 1386.40 General. (Sec. 133(a) and (b))

In order to participate in this program a State must have a State plan which meets the requirements of these regulations and has been approved by the Commissioner. This section implements Sec. 133(a) and (b) of the Act.

Section 1386.41 Designation of the State Planning council and the State agency. (Sec. 133(b)(1)(A))

No substantive changes are proposed from the present regulation.

Section 1386.42 Plan submittal and approval. (Sec. 133(c))

Subsection (a) contains major change brought about by the 1978 amendments which provides that the State plan must set forth the activities to be supported by funds allotted to the State under the Act. These activities may be carried out over a three year period. In the intervening years, the State is to submit an annual report of its review and description of the extent and scope of services to be provided, as required by Section 133(b)(2)(C) of the Act. This regulation (in subsection (a)) is designed to produce better planning and services, and to reduce paperwork.

Subsection (b) requires that the State plan contain a statement that it was developed jointly by the State Council and the designated State agency, and that it be signed by the chairperson of the council and the official representative of the State agency.

The remaining paragraphs contain no substantive changes from the present regulation.

Section 1386.43 Methods of administration.

No substantive changes are proposed from the present regulation.

Section 1386.44 Description of objectives and services. (Sec. 133(b)(2)(A) and (B))

The purpose of subsection (a) is to ensure that the plan contains clear goals and objectives; that resources are directed toward the achievement of these goals; and that there will be greater congruence among the States than when each State was free to select its own goals entirely.

The next subsection, (b), requires that Federal developmental disabilities funds be used to augment rather than duplicate or replace existing services provided by other Federal/State programs. We believe that this provision

is essential to assure that States develop a comprehensive plan to bring together all available resources so that the developmentally disabled may be served in the most effective, efficient way. It continues policy now in existing regulations.

Subsection (c) requires that the State plan describe the extent and scope of priority services which will be provided each year under the plan. We expect that the annual review will lead to a shift from one area to another if the State determines that the change will result in more or better services.

Subsection (d) requires the establishment of a method and criteria for evaluating the effectiveness of the State plan in meeting its objectives. No substantive change from the present regulation is proposed.

Section 1386.45 Priority services. (Sec. 133(b)(4))

Since 1970, the Developmental Disabilities Act and its amendments including the 1978 amendments, have contained a list of 16 specialized services needed by persons with developmental disabilities at various periods throughout their lifetimes. This list was intended to be illustrative rather than restrictive. The purpose has been to suggest the variety of services needed.

Instead of leaving States free to choose one of these 16 services for support by funds under this Subpart, the Act now establishes four priority service areas for the use of Federal funds. The House Report states several advantages to focusing on the four priority service areas instead of leaving the selection entirely to the discretion of the States. (H. Rept. 95-1188, *supra*, p. 10)

The four priority services are: (1) case management services, (2) child development services, (3) alternative community living arrangement services, and (4) nonvocational social-developmental services. They are further described in this section.

States may not provide activities in their State plan that are necessary but subordinate parts of one priority service as a separate priority service area. For example, alternative community living arrangement services obviously are focused on one's residence and the services directly related to residence. Case management services are focused on the need for people in residential and non-residential settings. If a place to live is to be provided under the plan, the alternative community living arrangement services would be the priority area selected. Case management services provided to people in the community living setting may not be

identified as a separate priority service area.

Section 1386.46 Use of funds. (Sec. 133(b)(3))

No substantive changes are proposed from the present regulation.

Section 1386.47 Provision of priority services. (Sec. 133(b)(4))

Subsection (a) requires the State council to select one or more priority service areas for which Federal funds will be expended. The priority service areas selected must be identified in the State plan. Paragraph (2) states the statutory criteria for determining the number of service areas that may be funded in any year. Until the appropriation exceeds \$60 million per year, a State is required to fund one, but not more than two, of the priority service areas. No more than three priority service areas may be funded if the appropriation exceeds \$60 million but is less than \$90 million per year.

Paragraph (3) authorizes a State, once it has selected a Federal priority service area, to select a service area of its own choice as a substitute for one or more additional Federal priority service areas.

Paragraph (4) allows a State to request that the Commissioner grant a waiver of the limitations set forth in the two previous paragraphs. The waiver allows the State to fund additional service areas. This paragraph states the conditions on the granting of the waiver. The purpose of providing for a waiver is to allow States, under limited circumstances, to use Federal funds for a service other than those specified in the Act. The basis for the waiver is Section 133(b)(4)(C) of the Act.

Subsection (b) requires the State council and State agency to review annually the priority service areas and the need for continuing them. Changes may be made if needed.

Subsection (c) allows the State to put into effect its plan for comprehensive services immediately, or not later than October 1, 1980. The basis for this is Section 133(b)(4)(A)(ii). The Department has interpreted this section to mean that a State must meet the priority service requirements not later than the start of the 1981 fiscal year.

Subsection (d) requires that the State plan indicate what portion of its allotment is being expended in the priority service areas. The amount specified must be not less than \$100,000 or 65 percent of the State's allotment, whichever is the greater.

Subsection (e) lists the activities costs of which may be assigned to "service activities." The purpose is to allow

States to support activities necessary to the provision of high quality services.

Subsection (f) continues the previous provision of the Act and regulations for special financial and technical assistance to urban and rural poverty areas. States shall use the areas designated by the State Health Planning and Development Agencies (HPDA) and approved by the Secretary. The list of those areas was published in the *Federal Register*, Vol. 43, No. 19, January 27, 1978, and is available from the State HPDA and HEW Regional Offices.

Section 1386.48 Standards for services and protection of rights. (Sec. 133(b)(5))

This section of the proposed regulations lists other assurances that must be in the State plan. The plan must assure the Commissioner that: (a) The facilities in which services are furnished comply with the Architectural Barriers Act, (b) individual habilitation plans will be developed for each individual served, (c) the human rights of each person (especially those persons without familial protection) will be protected, and (d) affirmative steps will be taken to ensure an opportunity for participation of the developmentally disabled population in programs with special attention given to minority groups.

The required assurances described in (a), (b), and (c) above are consistent with policies issued previously by the Department. The assurance required by subsection (d) is a statutory requirement.

Section 1386.49 Professional assessment and evaluation programs. (Sec. 133(b)(6))

The State plan must provide for assessing the adequacy of the training of personnel providing service to developmentally disabled people, and of the State programs supporting training of professional and paraprofessional personnel. The State plan must further indicate how these training activities will bring about high quality services. Among other resources, university affiliated facilities must be utilized in States where they are available and appropriate.

Subsection (c) requires planning and implementation of a comprehensive system for the evaluation of services provided to developmentally disabled persons assisted under the Act, as mandated by Section 110 of the Act. As a condition for the receipt of Federal funds, the States must submit a plan for implementing the system by October 1980 and must implement it by October 1982.

Section 1386.50 Utilization of community resources and volunteers. (Sec. 133(b)(7)(A))

No substantive changes are proposed from present regulation.

Section 1386.51 Protection of employees' interests. (Sec. 133(b)(7)(B))

The Act requires that a State which selects alternative community living arrangement services for priority funding must provide for the protection of the interests of employees whose jobs in institutions are placed in jeopardy. The proposed regulation has been expanded considerably from the present one. We have found that there is confusion as to what is required for employees' protection and that the present regulations are being misinterpreted or ignored. The proposed regulation states specifically the statutory requirements. We have added performance standards States and institutions must follow in providing for fair and equitable arrangements to protect the interests of employees affected by alternative community living arrangement services assisted under the Act. These arrangements were developed in consultation with the Secretary of Labor.

Section 1386.52 Individual habilitation plans. (Sec. 112)

No substantive changes are proposed from present regulation.

Section 1386.53 Federal financial participation.

The purpose of this regulation is to state the conditions under which Federal financial participation in expenditures is allowable. Allowable and nonallowable costs specified are in addition to those listed in 45 CFR Part 74

Section 1386.54 Additional information and assurances. (Sec. 133(b)(8))

This section permits the Commissioner to request additional information and assurances in the State plan when he finds them necessary to carry out the provisions and purposes of the Act and these regulations.

Section 1386.55 Final disapproval of the State plan.

This section outlines steps that must be taken before any State plan is finally disapproved. The purpose is to ensure that the State's interests are protected while ensuring adherence by the State to the Act and regulations.

Subpart D—Practice and Procedure for Hearings Pertaining to States Conformity and Compliance With Developmental Disabilities Plans and Federal Requirements

Subpart D continues the practice and procedure for hearings to States when questions of conformity of State plans for the developmentally disabled with Federal requirements, as well as questions of compliance of States with their plans and Federal requirements, have been raised. It also adds provisions relating to the protection and advocacy system, and makes technical changes, including cross-references to appropriate sections of the regulations.

The changes in Part 1386, Subpart D, were made to ensure that an appeal of a ruling unfavorable to a State would be to an official that was not involved in the decision at a lower level.

No substantive changes are proposed from present regulation, except in § 1386.92. We are proposing that hearings be held in locations which will minimize travel costs for all concerned.

Part 1387—Special Projects

Section 1387.1 Purposes of projects. (Sec. 145 (a) and (c))

The program of special projects provides a means of increasing the effectiveness and efficiency of services provided under the formula grant programs by supporting activities which benefit a number of States. The purpose of § 1387.1 is to incorporate into the regulations the statutory purposes for which grants may be made.

Section 1387.2 Projects of national significance. (Sec. 145(g))

This section sets forth criteria for projects of national significance. These criteria are presently stated in the definitions section of the regulations. Otherwise there are no substantive changes from the present regulations. The availability of these grants will be announced periodically in program announcements issued by the Commissioner.

Section 1387.3 Eligible applicants. (Sec. 145(a))

Section 1387.4 Application content and procedure. (Sec. 145(d))

No substantive changes are proposed from present regulation.

Section 1387.5 Amount of grant. (Sec. 145(e))

This section states conditions for determining amount of a grant.

Authority: These regulations are issued under the authority of Sec. 109 of Title I of the Mental Retardation Facilities and Community

Mental Health Centers Construction Act of 1963, as amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Assistance and Bill of Rights Act.

45 CFR, Chapter XIII Parts 1385, 1386 and 1387 are superseded and new parts 1385, 1386 and 1387 are added.

(Catalog of Federal Domestic Assistance Program, Nos. 13.630 Developmental Disabilities—Basic Support; and 13.631 Developmental Disabilities—Special Projects)

Dated: April 29, 1980.

Cesar A. Perales,

Acting Assistant Secretary for Human Development Services.

Approved: May 2, 1980.

Patricia Roberts Harris,

Secretary.

Chapter XIII of Title 45 of the Code of Federal Regulations is amended as follows:

PART 1385—GENERAL

1. Part 1385 is revised to read as follows:

Sec.

1385.1 Purpose of the regulations.

1385.2 Definitions.

1385.3 Rights of persons with developmental disabilities (rights).

1385.4 Grants administration requirements.

1385.5 Awards.

1385.6 Recovery of Federal funds used for construction of facilities.

1385.7 Assurances regarding evaluation system.

Authority: Section 109, Pub. L. 88-164, as amended by Pub. L. 95-602.

§ 1385.1 Purpose of the regulations.

These regulations implement the provisions of the 1978 amendments to the Developmental Disabilities Assistance and Bill of Rights Act (Pub. L. 95-602) and meet additional program needs which have become apparent. The goal of the regulations is to help States and localities to provide care, treatment and other services necessary to enable persons with developmental disabilities to achieve their highest possible level of functioning and greatest possible enjoyment of life.

§ 1385.2 Definitions.

For purposes of this Part and Parts 1386 and 1387—

"Act" means the statutory authority for the developmental disabilities programs as originally enacted in Pub. L. 88-164 as amended by Pub. L. 90-170, Pub. L. 91-517, Pub. L. 94-103, and Pub. L. 95-602.

"Commissioner" means the Commissioner of the Rehabilitation Services Administration, Office of Human Development Services, Department of Health, Education, and Welfare.

"Consumer" means a person who meets the requirements of the definition of developmental disabilities.

"Consumer representatives" means a parent, other immediate relative, or guardian of a consumer.

"Department" means the Department of Health, Education, and Welfare.

"Director" means the Director, Bureau of Developmental Disabilities, Rehabilitation Services Administration.

"Developmental disability" means a severe, chronic disability of a person which—

(a) Is attributable to a mental or physical impairment or combination of mental and physical impairments;

(b) Is manifested before the person attains age twenty-two;

(c) Is likely to continue indefinitely;

(d) Results in substantial functional limitations in three or more of the following areas of major life activity: (i) self-care, (ii) receptive and expressive language, (iii) learning, (iv) mobility, (v) self-direction, (vi) capacity for independent living, and (vii) economic sufficiency; and

(e) Reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.

"Facility for persons with developmental disabilities" means a facility, or a specified portion of a facility, designed primarily for the delivery of one or more services to persons with developmental disabilities.

"Governor" means the chief executive officer of the State or Territory, or his or her designee who has been formally deputized to act for the Governor in carrying out the requirements of the Act and these regulations.

"Institution" means any residential facility in which a person with a developmental disability is housed with non-related persons.

"Poverty area" means an urban or rural area that meets the criteria contained in § 1386.47(f) of these regulations.

"Protection and advocacy office" means the instrumentality designated by the Governor or legislature to administer the State's protection and advocacy system.

"Protection and advocacy system" means all protection and advocacy services and the means used to provide them described in the approved report required by § 1386.22.

"Public agency" means any State, unit of local government, combination of States or units, or any department, agency, or instrumentality of them, including State institutions of higher

education, hospitals and any Indian tribal government.

"Recipient" means a developmentally disabled person or his or her parent, guardian or close relative receiving services assisted under the Act.

"Secretary" means the Secretary of Health, Education, and Welfare, and references to the Secretary include any individual authorized to carry out the Act by delegation or redelegation.

"Services for persons with developmental disabilities" means priority services (as defined in § 1386.45); and any other specialized services or special adaptations of generic services for persons with developmental disabilities. "Special adaptations of generic services" are services that are generally available to the public and require modification to meet the special needs of the developmentally disabled person. Generic services include diagnosis, evaluation, treatment, personal care, day care, domiciliary care, special living arrangements, training, education, sheltered employment, recreation, counseling of the individual with a developmental disability and of his family, protective and other social and socio-legal services, information and referral services, follow-along services, and transportation services necessary to assure delivery of services to persons with developmental disabilities.

"State" means the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands, except as otherwise provided in the Act or regulations.

"State agency" means the State agency or agencies designated in the State plan to administer or supervise the administration of all or designated portions of the State plan.

"State plan" means the approvable document or documents submitted by the State to comply with the requirements for participation under Parts 1385 and 1386.

"State planning council" (also referred to as "State council" or "council") means a body which meets the standards of § 1386.30.

"University affiliated facility" means a public or non-profit facility that is associated with, or is an integral part of, a college or university. These facilities must provide for at least the following activities: interdisciplinary training for personnel concerned with developmental disabilities; demonstration of the provision of exemplary services; dissemination of findings of those and other

demonstrations; and furnishing researchers and government agencies sponsoring service-related research with information on the needs for further service-related research.

"Volunteer" means a person who provides a service without compensation, except for reimbursement of actual expenses.

§ 1385.3 Rights of persons with developmental disabilities (rights).

(a) Section 111 of the Act, "Rights of Persons with Developmental Disabilities", is applicable to the programs authorized under the Act, except for the protection and advocacy system. The basic State plan and all applications for university affiliated facilities or special projects grants must contain an assurance to the Commissioner that the grantee will not provide Federal, State or other public funds to any activity which serves persons with developmental disabilities that is not in compliance with these Rights.

(b) Failure to comply with this assurance may result in the loss of Federal funds under the Act.

(c) The Rights include:

(1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.

(2) The treatment, services, and habilitation for persons with developmental disabilities shall be designed to maximize the developmental potential of the person and shall be provided in the setting that is least restrictive of the person's personal liberty.

(3) Federal and State funds shall not be expended or provided to any institutional or other residential program for persons with developmental disabilities that—

(i) does not provide treatment, services, and habilitation which are appropriate to their needs; or

(ii) does not meet the following minimum standards:

(A) Provides a nourishing, well-balanced daily diet to the persons with developmental disabilities being served by the program;

(B) Provides appropriate and sufficient medical and dental services.

(C) Prohibits the use of physical restraint unless absolutely necessary and prohibit the use of physical restraint as a punishment or as a substitute for a habilitation program;

(D) Prohibits the excessive use of chemical restraints, and the use of chemical restraints as punishment or as a substitute for a habilitation program;

"Presiding officer" means anyone appointed by the Assistant Secretary to conduct any hearing held under this Subpart. The term includes the Assistant Secretary if the Assistant Secretary presides over the hearing.

§ 1386.81 Scope of rules.

(a) The rules of procedure in this Subpart govern the practice for hearings afforded by the Department to States pursuant to § 1386.11, 1386.23, 1386.24 and 1386.42.

(b) Nothing in this Part is intended to preclude or limit negotiations between the Department and the State, whether before, during, or after the hearing to resolve the issues which are, or otherwise would be, considered at the hearing. Negotiations and resolution of issues are not part of the hearing, and are not governed by the rules in this Subpart, except as otherwise provided in this Subpart.

§ 1386.82 Records to be public.

All Pleadings, correspondence, exhibits, transcripts of testimony, exceptions, briefs, decisions, and other documents filed in the docket in any proceeding are subject to public inspection.

§ 1386.83 Use of gender and number.

As used in this Subpart, words importing the singular number may extend and be applied to several persons or things, and vice versa. Words importing either gender may be applied to the other gender or to organizations.

§ 1386.84 Suspension of rules.

Upon notice to all parties, the Assistant Secretary may modify or waive any rule in this Subpart, unless otherwise expressly provided, upon determination that no party will be unduly prejudiced and justice will be served.

§ 1386.85 Filing and service of papers.

(a) All papers in the proceedings shall be filed with the HDS Hearing Clerk in an original and two copies. Only the originals of exhibits and transcripts of testimony need be filed.

(b) All papers in the proceedings shall be served on all parties by personal delivery or by mail. Service on the party's designated representative will be deemed service upon the party.

Preliminary Matters—Notice and Parties

§ 1386.90 Notice of hearing or opportunity for hearing.

Proceedings are commenced by mailing a notice of hearing or opportunity for hearing from the Commissioner to the State council and

the designated State agency, or to the State protection and advocacy office or official. The notice shall state the time and place for the hearing, and the issues which will be considered. The notice will be published in the Federal Register.

§ 1386.91 Time of hearing.

The hearing shall be scheduled not less than 30 days nor more than 60 days after the date notice of the hearing is mailed to the State.

§ 1386.92 Place.

The hearing shall be held at a date, time, and place determined by the Assistant Secretary with due regard for the convenience and necessity of the parties or their representatives.

§ 1386.93 Issues at hearing.

(a) Prior to a hearing, the Assistant Secretary may notify the State in writing of additional issues which will be considered at the hearing. That notice shall be published in the Federal Register. If that notice is mailed to the State less than 20 days before the date of the hearing, the State or any other party, at its request, shall be granted a postponement of the hearing to a date 20 days after the notice was mailed, or such later date as may be agreed to by the Assistant Secretary.

(b) If any issue is resolved in whole or in part, but new or modified issues are presented, the hearing shall proceed on the new or modified issues.

(c)(1) If at any time, whether prior to, during, or after the hearing, the Assistant Secretary finds that the State has come into compliance with Federal requirements on any issue in whole or in part, he or she shall remove the issue from the proceedings in whole or in part as may be appropriate. If all issues are removed the Assistant Secretary shall terminate the hearing.

(2)(i) Prior to the removal of an issue, in whole or in part, from a hearing involving issues relating to the conformity of State plan or report on the description of the protection and advocacy system with Federal requirements, the Assistant Secretary shall provide all parties other than the Department and the State (see § 1386.94(b)) with the Statement of his or her intention to remove an issue from the hearings and the reasons for that decision. A copy of the proposed State plan provision or report on the description of the protection and advocacy system on which the State and the Assistant Secretary have settled shall be sent to the parties. The parties shall have an opportunity to submit in writing within 15 days their views as to,

or any information bearing upon, the merits of the proposed provision and the merits of the reasons for removing the issue from the hearing.

(ii) In hearings involving questions of noncompliance of a State's operation of its program with the State plan or system description, or with Federal requirements, the same procedure set forth in paragraph (2)(i) of this Subsection shall be followed with respect to any report or evidence resulting in a conclusion by the Assistant Secretary that a State has achieved compliance.

(d) The issues considered at the hearing shall be limited to those issues of which the State is notified as provided in § 1386.90 and paragraph (a) of this Section, and new or modified issues described in paragraph (b) of this Section, and shall not include issues or parts of issues removed from the proceedings pursuant to paragraph (c) of this Section.

§ 1386.94 Request to participate in hearing.

(a) The Department, the State council, the designated State agency, and the State protection and advocacy office, as appropriate, are parties to the hearing without making a specific request to participate.

(b)(1) Other individuals or groups may be recognized as parties if the issues to be considered at the hearing have caused them injury and their interests are relevant to the issues in the hearing.

(2) Any individual or group wishing to participate as a party shall file a petition with the HDS Hearing Clerk within 15 days after notice of the hearing has been published in the Federal Register, and shall serve a copy on each party of record at that time in accordance with § 1386.85(b). Such petition shall concisely state (i) petitioner's interest in the proceeding, (ii) who will appear for petitioner, (iii) the issues petitioner wishes to address and (iv) whether petitioner intends to present witnesses.

(3) Any party may file comments within 5 days of receipt of such petition.

(4) The presiding officer shall promptly determine whether each petitioner has the requisite interest in the proceedings and shall permit or deny participation accordingly. Where petitions to participate as parties are made by individuals or groups with common interests, the presiding officer may request all of the petitioners to designate a single representative, or he or she may recognize one or more of the petitioners to represent all of them. The presiding officer shall give each petitioner written notice of the decision on its petition. If any petition is denied,

(E) Provides for close relatives to visit them a reasonable hours without prior notice;

(F) Complies with fire protection standards set forth in 42 CFR §§ 442.507, 442.508, and 442.509.

(4) All programs for persons with developmental disabilities shall meet standards designed to assure the most favorable possible result for those served, and—

(i) In the case of residential programs serving persons who need comprehensive health-related, habilitative, or rehabilitative service, standards which are at least equivalent to those applicable to intermediate care facilities for the mentally retarded (42 CFR Part 442, (1978)) where appropriate, taking into account the size of the institutions and their service delivery arrangements;

(ii) In the case of other residential programs, standards which assure that: (A) care is appropriate to the needs of the persons being served by such programs; (B) program facilities admit only persons whose needs can be met through services provided by the facilities; and (C) these facilities are sanitary, provide for humane care of their residents, and protect the residents' rights;

(iii) In the case of non-residential programs, standards which assure that the services meet the standards of (1) and (2) of this section, and also meet at least the health and safety codes of the local and State governments and applicable Federal standards of any program which provides Federal funds for developmentally disabled people.

§ 1385.4 Grants administration requirements.

(a) The following parts of Title 45 CFR apply to grants funded under Parts 1386, 1387, and 1388 of this chapter.

45 CFR Part 16—Department Grant Appeals Process.

45 CFR Part 46—Protection of Human Subjects

45 CFR Part 74—Administration of Grants.

45 CFR Part 75—Informal Grant Appeals Procedures (Indirect Cost Rates and Other Cost Allocations).

45 CFR Part 80—Nondiscrimination under Programs Receiving Federal Assistance Through the Department of Health, Education, and Welfare—Effectuation of Title VI of the Civil Rights Act of 1964.

45 CFR Part 81—Practice and Procedure for Hearings Act of 1964.

45 CFR Part 84—Nondiscrimination on the Basis of Handicap in Federally Assisted Programs.

(b) The Departmental Grant Appeals Board has jurisdiction over appeals by grantees who have received grants under sections 121, 122 and 145 of the

Act. The scope of the Board's jurisdiction concerning these appeals is described in 45 CFR 16.5.

(c) The Departmental Grant Appeals Board shall also have jurisdiction to decide appeals brought by the States concerning any disallowances taken by the Commissioner with respect to specific expenditures incurred by States, or by contractors or subgrantees of State. This jurisdiction relates to funds provided under the two formula grant programs establishing by sections 113 and 132 of the Act. Appeals filed by States shall be decided in accordance with 45 CFR Part 16 as modified by 45 CFR 16.91.

(d) In making audits, examinations, excerpts and transcripts of records of grantees and subgrantees, including the protection and advocacy system, as provided for in 45 CFR Part 74, the Secretary will keep information about individual clients confidential to the extent permitted by law and regulations.

§ 1385.5 Awards.

All grants awarded under Parts 1386, 1387, and 1388 must be in writing, and must set forth the duration and amount of the grant awarded.

§ 1385.6 Recovery of Federal funds used for construction of facilities.

(a) The United States Government retains a right-of-recovery from either the transferee or the transferor of an amount bearing the same ratio to the then value of Federal funds used for constructing and equipping facilities under title I, Parts B or C of the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963. This right-of-recovery is for a period of 20 years after completion of construction of the facility and is applicable only if (1) the facility is sold or transferred to any person who is ineligible to apply for a grant, or (2) the facility is no longer used as a public or nonprofit facility for developmentally disabled people. This provision applies instead of 45 CFR 74.134.

(b) The State council or the appropriate university affiliated facility official is to notify the Commissioner immediately, in writing, if any of the conditions in subsection (a) occurs. The Commissioner may waive the recovery provisions if he determines there is good cause to do so. The value of the facility is to be determined by agreement between the parties or, if they cannot agree on a value, by action of the United States District Court for the district in which the facility is located. The Federal share to be recovered is to be in the proportion that Federal funds bore to the cost of the project.

(c) This right-of-recovery is not to constitute a lien on the property prior to judgment.

§ 1385.7 Assurances regarding evaluation system.

(a) In order for a State to receive Federal financial assistance under the Act, it must submit to the Commissioner by October 1, 1980, a plan to provide for a system to evaluate services rendered to developmentally disabled people assisted under the Act. This plan is to contain a schedule for implementation of the system and is to be in effect no later than October 1, 1982.

(b) By October 1, 1982, each State must provide assurances satisfactory to the Commissioner that it is using the evaluation system.

PART 1386—FORMULA GRANT PROGRAMS

2. Part 1386 is revised to read as follows:

Subpart A—General

Allotments, Federal Share, and Payments

Sec.

1386.1 Formula for determining allotments.

1386.2 Allotment for basic grant program.

1386.3 Allotment for protection and advocacy system.

1386.4 Reallotment.

1386.5 Cooperative or joint effort between States and between agencies.

1386.6 Federal and non-Federal shares for the basic State grant program.

1386.7 Obligation by grantees and subgrantees.

1386.8 Nonduplication.

1386.9 Payments.

1386.10 Liquidation of obligations.

1386.11 Withholding of payments.

1386.12 Standards for a merit system of personnel administration.

1386.13 Fair hearings.

Subpart B—State System for Protection and Advocacy of Individual Rights

1386.20 Requirements for participation in the developmental disabilities program.

1386.21 Designated State protection and advocacy office.

1386.22 Report on the State system.

1386.23 Submittal of the report on the State system.

1386.24 Amendments to the report.

1386.25 Annual reports.

1386.26 Federal financial participation.

1386.27 Prohibition of use of protection and advocacy system funds for lobbying.

Subpart C—State Plan for Provision of Services for Persons with Developmental Disabilities

State Planning Council

1386.30 Establishment of the State planning council.

1386.31 Makeup of the council.

1386.32 Duties of the council.

1386.33 Council staff.

State Plan Requirements for Planning, Administration and Services

- 1386.40 General
- 1386.41 Designation of the State planning council and the State agency.
- 1386.42 Plan submittal and approval
- 1386.43 Methods of administration
- 1386.44 Description of objectives and services.
- 1386.45 Priority services.
- 1386.46 Use of funds.
- 1386.47 Provision of priority services
- 1386.48 Standards for services and protection of rights.
- 1386.49 Professional assessment and evaluation programs.
- 1386.50 Utilization of community resources and volunteers.
- 1386.51 Protection of employees' interests.
- 1386.52 Individual habilitation plans.
- 1386.53 Federal financial participation.
- 1386.54 Additional information and assurances.
- 1386.55 Final disapproval of the State plan.

Subpart D—Practice and Procedure for Hearings Pertaining to States' Conformity and Compliance With Developmental Disabilities Plans and Federal Requirements**General**

- 1386.80 Definitions.
- 1386.81 Scope of rules.
- 1386.82 Records to be public.
- 1386.83 Use of gender and number.
- 1386.84 Suspension of rules.
- 1386.85 Filing and service of papers.

Preliminary Matters—Notice and Parties

- 1386.90 Notice of hearing or opportunity for hearing.
- 1386.91 Time of hearing.
- 1386.92 Place.
- 1386.93 Issues at hearing.
- 1386.94 Request to participate in hearing.

Hearing Procedures

- 1386.100 Who presides.
- 1386.101 Authority of presiding officer.
- 1386.102 Rights of parties.
- 1386.103 Discovery.
- 1386.104 Evidentiary purpose.
- 1386.105 Evidence.
- 1386.106 Exclusion from hearing for misconduct.
- 1386.107 Unsponsored written material.
- 1386.108 Official transcript.
- 1386.109 Record for decision.

Posthearing Procedures, Decisions

- 1386.110 Posthearing briefs.
- 1386.111 Decisions following hearing.
- 1386.112 Effective date of decision by the Assistant Secretary.

Authority: Section 109, Pub. L. 88-164, as amended by Pub. L. 95-607.

Subpart A—General**Allotments, Federal Share, and Payments****§ 1386.1 Formula for determining allotments.**

The Commissioner will allocate funds appropriated under the Act for the purpose of the basic State program (see

Subpart C—State Plan for Provision of Services for Persons with Developmental Disabilities) and the protection and advocacy system (see Subpart B—State System for Protection and Advocacy of Individual Rights) on the following basis:

(a) Two-thirds of the amount appropriated shall be allotted to each State according to the ratio the population of each State bears to the population of the United States. This ratio is weighted by the relative per capita income for each State. The data used to compute allotments are supplied by the U.S. Department of Commerce, for the three most recent consecutive years for which satisfactory data are available.

(b) One-third of the amount appropriated shall be allotted to each State on the basis of the relative need for services of persons with developmental disabilities. The relative need is determined by the number of persons receiving benefits under the Childhood Disabilities Beneficiary Program (Section 202(d)(1)(B)(ii) of the Social Security Act).

§ 1386.2 Allotment for basic grant program.

The minimum allotment for the basic formula grant program to each State, the District of Columbia, and Puerto Rico, in any fiscal year is \$250,000 or the amount of the allotment received by the State for the fiscal year ending September 30, 1978, whichever is greater. For the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and the Trust Territory of the Pacific Islands, the allotment in any fiscal year shall not be less than \$135,000.

§ 1386.3 Allotment for protection and advocacy system.

(a) The minimum allotment for the protection and advocacy system to each State, the District of Columbia, and Puerto Rico, in any fiscal year is \$50,000, or the amount of the allotment received by the State for the fiscal year ending September 30, 1978, whichever is greater. For the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and the Trust Territory of the Pacific Islands, the allotment in any fiscal year shall not be less than \$30,000.

(b) If the total of the allotments to the States under Subsection (a) for any fiscal year exceeds the amount appropriated, the allotment will be equal to the ratio which the State's allotment bore to the total amount appropriated in fiscal year 1978. In all cases, each State

and Territory will receive its minimum allotment.

§ 1386.4 Reallotment.

If the Commissioner determines that any portion of the allotment to a State will not be required for allowable costs during the period for which it is available, the Commissioner may reallot it. If funds are to be reallotted, the Commissioner will publish a notice in the Federal Register 30 days prior to reallotting the funds. Reallotments are to be made in the same proportion as the original allotments.

§ 1386.5 Cooperative or joint effort between States and between agencies.

If the State plan provides for joint effort between public or private agencies in more than one State, portions of funds allotted to one or more of the cooperative States may be combined according to agreements between the agencies involved.

§ 1386.6 Federal and non-Federal shares for the basic State grant program.

(a) *Federal share.* (1) The Federal share for a State may not exceed 75 percent of the allowable costs under the approved State plan.

(2) If any activity funded under this program is located in and serves primarily people who live in a poverty area, the Federal share may not exceed 90 percent of the total cost of the project or activity.

(b) *Non-Federal share.* Rules for satisfying the requirements for the non-Federal share of any project, program, or activity assisted by a grant under this Subpart are in 45 CFR, Part 74, Subpart C.

§ 1386.7 Obligation by grantees and subgrantees.

(a) Funds which the Federal government obligates under this Part during a Federal fiscal year are available for obligation by grantees and subgrantees through the end of that same Federal fiscal year.

(b)(1) Grantees and subgrantees incur an obligation for acquisition of personal property or for the performance of work on the date it makes a binding, legally enforceable, written commitment.

(2) Grantees and subgrantees incur an obligation for personal services, for services performed by public utilities, for travel or for rental of real or personal property on the date it receives the services, its personnel takes the travel, or it uses the rented property.

§ 1386.8 Nonduplication.

The Commissioner is to determine the Federal share of allowable costs incurred by the State under its approved

State plan. In making this determination, he is to disregard the amount of any other Federal funds expended and the amount of any non-Federal funds required for matching. Any exception must be expressly provided for by Federal statute.

§ 1386.9 Payments.

(a) The Commissioner will pay the Federal share of expenditures incurred in the fiscal year under the approved State plan, and under the approved report on the protection and advocacy system. For purposes of this Part the term "expenditures incurred" is interpreted to mean allowable costs pertaining to that year. A cost resulting from an obligation incurred during a year is deemed to pertain to that year.

(b) An authorized State official may request the Commissioner to pay from the State's allotment under Subpart C of this Part not more than 50 percent of the costs of administering the State plan. The payment is not to exceed 5 percent of the allotment or \$50,000, whichever is less. In order to receive this payment, the State must expend from its own sources, for the current fiscal year, an amount equal to or greater than that expended in the previous fiscal year for administration of the State plan. Costs of administering the State plan do not include costs for planning activities or provision of services.

§ 1386.10 Liquidation of obligations.

All obligations made by the State agency or subgrantees under the State plan and the report on the description of the State's protection and advocacy system must be liquidated within one year of the close of the Federal fiscal year in which obligations were incurred. This requirement may be waived only where the validity of the obligation or the amount of the obligation is being actively disputed by the State agency or subgrantee.

§ 1386.11 Withholding of payments.

After notice to the State and an opportunity for a hearing, the Secretary may withhold payments to the State with respect to costs resulting from obligations incurred after opportunity for the hearing or after a final decision following a hearing if he finds that there is a failure to comply substantially with the State plan, or with the report on the description of the protection and advocacy system, or the Act, or applicable regulations. Hearing procedures will be conducted in accordance with Subpart D of this part.

§ 1386.12 Standards for a merit system of personnel administration.

The State plan and the report on the protection and advocacy system must provide that methods of personnel administration and affirmative action plans for equal employment opportunity in the State and local agencies administering the programs will conform to the Standards for a Merit System of Personnel Administration, Subpart F, Part 900, and other standards prescribed by the Office of Personnel Management. The standards for a Merit System were published in the Federal Register, Vol. 44, No. 34, page 10238, February 16, 1979. The affirmative action plan must be available to the Secretary for review, upon request.

§ 1386.13 Fair hearings.

The State plan shall provide for a system of hearings under which applicants or recipients or their representatives may appeal the denial, reduction, or termination of a service, or failure to act upon a request for service with reasonable promptness. The procedures and provisions of 45 CFR 205.10 govern these hearings.

Subpart B—State System for Protection and Advocacy of Individual Rights

§ 1386.20 Requirements for participation in the developmental disabilities program.

(a) In order for a State to receive an allotment under Subpart C, it must have in effect a system to protect and advocate the rights of persons with developmental disabilities.

(b) Failure to submit a report of or to carry out an approved system to protect and advocate the rights of persons with developmental disabilities will result in the loss of Federal funds for programs authorized under this subpart and Subpart C (State Plan for Provision of Services).

(c) The Protection and Advocacy (P&A) System must meet the following requirements—

(1) The P&A System must have the authority to pursue legal, administrative, and other appropriate remedies to ensure the protection of the rights of all individuals with developmental disabilities who are receiving services or are eligible for services in the State.

(2) The P&A System must have the authority to institute administrative and legal proceedings to redress the rights of institutionalized persons with developmental disabilities without the necessity of representing a named client. At the time of commencement of any proceeding under this section, the P&A

System shall certify to the administrative body or court that:

(i) The P&A System has endeavored to eliminate the alleged conditions and practices by informal methods, including discussion with appropriate officials of the possible costs and fiscal impacts of alternative remedial measures;

(ii) The P&A System is satisfied that the appropriate officials have had a reasonable time to take appropriate action to correct such conditions or practices but have failed to do so;

(iii) The P&A System believes that administrative or legal proceedings are of general public importance and will materially further the protection of the rights, privileges, or immunities of developmentally disabled individuals secured by the Constitution or laws of the United States or of any State or locality.

(3) The P&A System must have appropriate access to the personal, medical, and other records pertaining to the care of institutionalized developmentally disabled persons who have been judicially declared mentally incompetent after giving reasonable notice to the guardians of such persons. In the case of an institutionalized developmentally disabled person who is not mentally impaired, the P&A System must have appropriate access to that person's relevant records after obtaining the consent of that person.

(4) The P&A System must establish procedures to protect the confidentiality of the records examined under 1386.20(c)(3). These procedures must conform to the requirements of 42 CFR Part 442.502. This requirement, however, in no way limits or restricts the Department's access to the records of the P&A System.

(5) The P&A System may not be administered or controlled by the State Planning Council.

(6) The P&A System must be independent of any agency, public or private, which provides treatment, services or habilitation to persons with developmental disabilities.

(7) The P&A System must have the authority on its own initiative to obtain access to institutions and programs serving persons with developmental disabilities. This right to access shall include the right to meet with persons with developmental disabilities in residential and non-residential facilities to explain the purposes of the protection and advocacy system, assistance that is available to them, and other details of the program. Exercise of this authority shall not require advance notice as long as the visits take place at a time and in a manner that does not disrupt the operation of the facility or program, for

example, a visit during normal visiting hours.

§ 1386.21 Designated State protection and advocacy office.

(a) The Governor shall designate the office for administering the State protection and advocacy system.

(b) The State protection and advocacy office must be a public or private, non-profit entity.

§ 1386.22 Report on the state system.

(a) At least once every three years the Governor shall submit an approvable report to the Commissioner describing the State system. The report must conform to these regulations and with guidelines issued by the Commissioner.

(b) The report must include—

(1) Assurance that the system will comply with the requirements listed in § 1386.20, including—

(i) An assurance that members and staff of the State planning council together with providers of services do not constitute a majority of a quorum of any board of directors of the system; and

(ii) An assurance that the staff of the State planning council will not serve as staff of the protection and advocacy office.

(2) An explanation of the administrative structure of the system including the executive order or a citation to the law establishing the system and the following information:

(i) If it is a public entity, an explanation of the office's location within the State structure; or

(ii) If it is a private non-profit entity, the name and title of the person in State government to whom it reports, and a copy of the articles of incorporation and bylaws;

(3) The goals and objectives for the system;

(4) The methods being used to ensure that the system is available to persons with developmental disabilities, especially those residing in institutions, and those not receiving services;

(5) The procedures by which the office determines which clients will be served. If choices must be made;

(6) A statement of the ways legal, administrative and other appropriate remedies are utilized by the system to achieve its goals;

(7) An explanation of the facilities and resources that are being used to operate the system;

(8) A list of other protective and advocacy services in the State which relate to this program, and explanations of cooperative relationships with them.

(9) Other information the Commissioner may require.

§ 1386.23 Submittal of the report on the State system.

(a) The report must be submitted by the Governor to the Commissioner for approval. The report must be submitted to the appropriate HEW Regional Office 60 days prior to the period for which it is applicable.

(b) Failure to submit an approvable report prior to the beginning of the period covered by the report shall result in the loss of Federal financial participation in costs resulting from obligations incurred during the period of the fiscal year for which an approvable description or revision has not been submitted. Failure to submit an approvable report at the appropriate time may also result in loss of Federal funds under the State plan submitted under Subpart C.

(c) The Secretary will not disapprove any report describing the protection and advocacy system or revision of the system until he or she has given the State reasonable notice and opportunity for a hearing governed by Subpart D of this part.

§ 1386.24 Amendments to the report on the system.

The Governor shall approve and submit to the Commissioner a description of any change in the system which will affect the way it is to carry out its required functions. These amendments must be submitted to and approved by the Commissioner prior to their implementation. The amendments must include a procedure for providing continuity of services to persons with developmental disabilities during the transition.

§ 1386.25 Annual reports.

(a) The following reports must be submitted to the Commissioner annually:

(1) Proposed budget for the next Federal fiscal year;

(2) Program performance report; and

(3) Financial status report.

(b) The program performance report shall describe the activities carried out under the system and any changes made in the system during the previous fiscal year.

(c) The proposed budget and the program performance report must be submitted by the Governor to the appropriate HEW Regional Office. The proposed budget for the next Federal fiscal year must be received in the regional Office 60 days prior to the beginning of the fiscal year to which it is applicable. The Financial Status Report must be submitted by either the Governor or the appropriate State financial official.

§ 1386.26 Federal financial participation.

(a) Federal financial participation is allowable for costs incurred—

(1) Under the State's approved report on the State system;

(2) For providing information and referral services to persons who contact the system for aid whether or not those persons are developmentally disabled;

(3) To solve or alleviate problems of discrimination or denial of rights related to the eligible person's disabilities.

(b) Costs for which Federal financial participation is not allowable are—

(1) Payments made after the end of the Federal fiscal year following the fiscal year in which the underlying obligation was initially incurred. (Sec. 1386.9. Liquidation of obligations);

(2) Except for information and referral services, costs incurred on behalf of persons who do not meet the definition of developmental disability in § 1385.2;

(3) Costs incurred for activities not included in the approved description of the system;

(4) Costs incurred for activities on behalf of persons with developmental disabilities to solve problems not directly related to their disabilities and which are faced by the general populace, for example, drawing up wills and initiating or defending against divorces; and

(5) Costs not allowed under applicable regulations.

§ 1386.27 Prohibition of use of protection and advocacy system for lobbying.

No money available under this subpart shall be used to lobby Congress as set forth in 18 U.S.C. 1913. For this purpose, lobbying means any unsolicited communication with members of the Congress for the purpose of influencing their actions relating to any legislation or appropriation before or after introduction of a bill.

Subpart C—State Plan for Provision of Services for Persons with Developmental Disabilities

State Planning Council

§ 1386.30 Establishment of the State planning council.

Each State which receives Federal assistance under this part must establish a State planning council.

§ 1386.31 Makeup of the council.

(a) The Governor shall appoint the members of the council from among the residents of the State, and shall make appropriate provisions for rotation of all members except the representatives of State/Federal programs. The State plan shall contain a statement of the policies

governing the rotation of council membership. The policies must ensure that all the consumers and their representatives are not replaced in a single year to assure the efficacy of the council's advocacy role, and to the extent possible, membership on the council must include representatives from minority groups.

(b) The council must at all times include in its membership a separate representative from each of the following State/Federal programs: developmental disabilities program, education for the handicapped, vocational and other rehabilitation programs, public assistance, medical assistance, social services, maternal and child health, crippled children's services, comprehensive health planning, mental health services, and mental retardation services. The Secretary may waive this requirement upon a request from the Governor of the State showing that State officials designated to represent more than one Federal/State program have the knowledge and authority to speak for and act for those programs. The council shall also include a representative of higher education training facilities (including a representative of a university affiliated facility if one is located in the State), and a single, different representative from each of the following groups: local governmental agencies, and non-governmental agencies and groups concerned with services to persons with developmental disabilities.

(c) At least one-half of the membership of the council shall consist of (1) persons who are themselves developmentally disabled, and (2) relatives or guardians of such persons.

(d) Of the number in (c) above, at least one-third shall be developmentally disabled persons themselves; and at least one-third shall be parents, other immediate relatives, or guardians of persons who are unable to represent themselves because of a mentally impairing developmental disability. One of the latter group shall represent an institutionalized person with a developmental disability.

(e) Consumer representatives shall not be employees of a State agency which receives funds or provides services under this Subpart, or managing employees of an entity providing services or receiving funds under this Subpart. In addition, an owner or person with a controlling interest in any entity receiving funds or providing services under this Subpart may not be a consumer representative.

The terms "managing employees," "owner or person with controlling interest" are defined in Sections 1126(b)

and 1124(a)(3), respectively, of the Social Security Act.

§ 1386.32 Duties of the council.

(a) It shall be the duty of the council to advocate programs and policies for persons with developmental disabilities in order to improve the State's programs of care, treatment, habilitation, and other services for them. The council shall set broad policy, determine priorities among service needs, and set goals and objectives for the State program of services for persons with developmental disabilities. In the case of disagreement between a council and an administering agency concerning the adoption of a goal or policy of the State plan, the Governor shall have the final authority for making the decision. In addition, the council shall—

(1) Develop the State plan jointly with the designated State agency(ies), including the specification of areas of priority services under § 1386.47 of this subpart;

(2) Monitor, review, and evaluate the implementation of the State plan, not less often than annually;

(3) Review and comment on all State plans which relate to programs affecting persons with developmental disabilities, to the maximum extent feasible;

(4) Review and comment on applications for grants under Part 1387, except applications for projects of national significance;

(5) Submit to the Commissioner, through the Governor, an annual report of its activities. This report is part of the program performance report required under § 1386.41(d).

(b) The council chairperson shall submit the State plan, plan amendments, annual reviews (subparagraph (a)(2) of this section), and related documents to the Governor, as required by Office of Management and Budget Circular A-95. The Governor shall have 45 days to review the materials prior to their submission to the Commissioner. Any comments the Governor makes shall be transmitted to the Commissioner with the documents.

(c) The council chairperson shall submit the State plan and related documents to the Commissioner 60 days prior to the fiscal year to which they are applicable.

(d) The council shall not exert any authority or control over policy or activity of the protection and advocacy office. The council shall not administer the office in any way.

§ 1386.33 Council staff.

(a) In order to carry out its responsibilities and duties, the State council must have a staff responsible to

the State council. The staff must be qualified to carry out the following functions: planning, monitoring, evaluation, advocacy, and management. The size of the professional staff will vary among States; however, each council shall have at least one full-time director and one full-time clerk/secretary.

(b) In determining the need for additional staff, the State shall take into account the particular needs of the council and the resources available to it.

(c) If necessary for the performance of its functions, the State council may employ consultants and may contract with individuals or entities for services.

State Plan Requirements for Planning, Administration and Services

§ 1386.40 General.

In order to receive Federal financial assistance under this Subpart, a State shall have in effect a State plan which meets the requirements of § 1386.41 through § 1386.54 and which is approved by the Commissioner.

§ 1386.41 Designation of the State planning council and the State agency.

The State plan shall provide for—

(a)(1) The establishment of a State council, in accordance with § 1386.30; (2) for the assignment to the council of adequate personnel to enable the council to carry out its duties; and (3) the identification of the staff.

(b) Identification of the State agency which has been designated by the Governor to administer or supervise the administration of the State plan. If there is more than one agency, the portion of the State plan for which each is responsible shall be stated, and amounts of the allotment apportioned among the agencies shall be specified, and

(c) Identification of a program unit within the designated State administering agency which has primary responsibility for proper and efficient administration of the State plan.

§ 1386.42 Plan submittal and approval.

(a) All of the following documents must be submitted by the council chairperson to the Commissioner for approval prior to their implementation:

(1) The State plan must be revised at least once every three years;

(2) The State plan must be amended at any time that substantive changes affect its administration or priorities;

(3) A description of the extent and scope of services provided or to be provided as required by § 1386.44(c) must be submitted annually in order for the State to receive Federal funds under this Subpart.

(b) The State plan must contain a statement that it was jointly developed by the State council and the designated State agency. This statement must be signed by the chairperson of the State planning council and by the appropriate official(s) of the State agency.

(c) Failure to submit an approvable plan, plan amendments, or annual review prior to the fiscal year for which they are applicable shall result in the loss of Federal financial participation in the costs resulting from obligations incurred during the period of the fiscal year for which they were not submitted.

(d) The Commissioner shall approve any State plan, amendment, or revision provided it meets the requirements of the Act, these and other applicable regulations, and performance standards issued by the Commissioner.

§ 1386.43 Methods of administration.

The State plan must describe the policies, procedures, and methods to be employed for the proper and efficient administration of the State plan, including application procedures for subgrantees. It must describe methods to be used to inform the general public in the State of the kinds and locations of services and facilities which are or will be available. It must also describe methods to be used to notify interested persons in the State as to where and when the State plan can be examined.

§ 1386.44 Description of objectives and services.

The State plan must—

(a) State the specific objectives to be achieved and list the programs and resources to be used to meet the objectives;

(b) Describe the extent and scope of services being provided or to be provided to developmentally disabled persons under other State plans for Federally assisted State programs. These programs included, but are not limited to, education for the handicapped, vocational and other rehabilitation programs, public assistance, medical assistance, social services, maternal and child health, crippled children's services, comprehensive health, mental health, aging, mental retardation and other plans the Commissioner specifies. The State plan must describe how the State's allotment will be used to complement and augment, rather than duplicate or replace, services for persons with developmental disabilities who are eligible for Federal assistance under these programs;

(c) Assess and describe the extent and scope of the priority services

(§ 1386.45) being or to be provided for each fiscal year; and

(d) Describe the method established for the periodic evaluation of the State plan's effectiveness in meeting the objectives described above.

§ 1386.45 Priority services.

For purposes of the State plan, priority services include case management, child development, alternative community living arrangements, and nonvocational social-developmental services. Priority services are defined as follows:

"Case management services" are services to assist in gaining access to needed social, medical, educational, and other services. The term includes: (1) follow-along services such as consultation and evaluation which ensure that the changing needs of the person and the family are recognized and appropriately met; and (2) coordination services which provide to persons with developmental disabilities support, access to other services, and monitoring of that person's progress.

"Child development services" are services to assist in the prevention, identification, and alleviation of developmental disabilities in children. They include: (1) early intervention services; (2) counseling and training of parents; (3) early identification of developmental disabilities; and (4) diagnosis and evaluation of developmental disabilities.

"Alternative community living arrangement services" are services to assist in maintaining suitable residential arrangements in the community. They include in-house services, for example personal aides and attendants, and other domestic assistance and supportive services; family support services; foster care services; group living services; respite care; and staff training, placement, and maintenance services.

"Nonvocational social-developmental services" are services to assist in the performance of daily living and work activities, for example: day activities, transportation, financial matters, recreation, civic concerns, and personal-social matters.

§ 1386.46 Use of funds.

The State plan must contain assurances that the State's Federal allotment will be used in whole or in part to—

(a) Make a significant contribution toward strengthening services for persons with developmental disabilities through agencies in the various political subdivisions of the State;

(b) Assist public or non-profit private entities;

(c) Supplement and increase the level of funds that would otherwise be made available for the purposes for which Federal funds are provided and not to supplant non-Federal funds; and

(d) provide for reasonable State financial participation in the cost of carrying out the State plan.

§ 1386.47 Provision of priority services.

(a)(1) The State plan must identify one or more priority service areas (§ 1386.45) on which Federal funds will be expended.

(2) The number of Federally funded priority service areas to be supported is determined by the appropriation for the fiscal year under Sec. 131 of the Act. Until the Federal appropriation exceeds \$60 million for a year, a State is required to fund one, but not more than two, of the priority service areas identified in the State plan. No more than three priority service areas may be funded when the appropriation exceeds \$60 million but is less than \$90 million per year.

(3) A State must select one Federal priority service area. At its option, depending on the size of the Federal appropriation (see paragraph (2) above), the State may select and identify one or two additional Federal priority service areas or one or two additional other service areas.

(4) The Commissioner, upon written application from the State council, may approve a waiver of the limitations described in paragraphs (a)(2) and (3) of this section. The application must demonstrate that—

(i) The funding of an additional area of priority services will not result in a disproportionate decrease in services in the other priority service areas;

(ii) Non-Federal expenditures for service activities in the fiscal year for which the waiver is requested will be not less than those reported on the Financial Status Report to the Secretary on Form HEW 260 for the fiscal year ended September 30, 1978; and

(iii) Insofar as possible, the requested area of service to be funded is one of the four Federal priority service areas. If the State finds that its need for another optional service (in addition to the one it found under paragraph (a) of this section) has a higher priority for that State than the remaining Federally established priority service areas, the State shall explain this finding in the application for the waiver. The application must be submitted to the Commissioner 90 days prior to the fiscal year for which funding is requested.

(b) The State council and State agency shall periodically (at least once every three years), examine the priority

service areas and the need for continuing them, and shall determine if changes are needed.

(c) The State, at its option, may implement its comprehensive plan for statewide services immediately or on a gradual basis. Whatever the decision of the council and agency, the State plan pertaining to priority service area or areas must be in full operation not later than October 1, 1980.

(d) The State plan must indicate that \$100,000 or 65 percent of the State's Federal allotment, whichever is greater, will be expended for providing service activities in the priority areas identified in the plan.

(e) The State plan may include the following additional service activities if they are components of the selected priority service areas: (1) model service programs; (2) activities to increase the capacity of institutions and agencies to provide services; (3) coordinating the provision of services in the area with other services; (4) outreach related to the service area; and (5) training of personnel to provide the services.

(f) Special financial and technical assistance must be given to agencies providing services to residents of urban or rural poverty areas. The list of areas designated by the State Health Planning and Development Agencies (HPDA) and approved by the Secretary under Title XVI, Sec. 1624(13) Pub. L. 93-641, as amended by Pub. L. 96-79, shall be used for this purpose. This list was published in the Federal Register, Vol. 43, No. 19 January 27, 1978, and is available from the State HPDA and HEW Regional Offices.

§ 1386.48 Standards for services and protection of rights.

The State plan must assure that and describe how—

(a) Services are rendered on an individualized basis as provided for in § 1386.52 (Individual habilitation plans);

(b) The human rights of persons with developmental disabilities (especially those without familial protection) are protected, consistent with § 1385.3 (Rights of persons with developmental disabilities);

(c) Buildings used for delivery of services meet the standards adopted under the Architectural Barriers Act of 1968, 42 U.S.C. 4151-4157 and applicable Federal regulations. An exception may be made only if the grantee certifies, before the grant award is issued, that the facility will be in compliance in the period covered by the award; and

(d) Affirmative steps have been taken to assure participation in programs authorized under the Act of individuals generally representative of the

developmentally disabled population, with special attention given to members of minority groups. The State plan shall provide that applications for subgrants contain detailed information on the total number of developmentally disabled people in the geographic area to be served, the number of minority persons with developmental disabilities in the area, the manner in which the services to be provided by the project will be made known to them, and what arrangements will be made to meet their special needs as members of minority groups.

§ 1386.49 Professional assessment and evaluation programs.

(a) The plan must provide for—

(1) An assessment of the adequacy of the skill level of persons, professional and paraprofessional, providing direct and indirect services; and

(2) An assessment of the adequacy of the State programs and plans supporting training of such professionals and paraprofessionals.

(b) The State plan must address the needs, disclosed by the two assessments, which must be met in order to achieve and maintain high quality of services. In developing this part of the plan, the State shall utilize resources of university affiliated facilities, where available and appropriate, and of other State and Federal manpower programs.

(c) The State plan must provide for planning and implementing the evaluation system in accordance with Section 110 of the Act.

§ 1386.50 Utilization of community resources and volunteers.

The plan must provide for the maximum utilization of all available community resources including volunteers (VISTA) serving under the Domestic Volunteer Service Act of 1973 (Pub. L. 93-113) and other appropriate voluntary organizations. Volunteer services must supplement, and must not be in lieu of, services of paid employees.

§ 1386.51 Protection of employees' interests.

(a) The State plan must provide for fair and equitable arrangements to protect the interests of all employees affected by actions under the plan to provide alternative community living arrangements. Specific arrangements for the protection of affected employees shall be developed through negotiations between the appropriate State authorities and employees or their representatives. Employees are to be given written notice prior to implementation of this priority service.

The arrangements must include, without being limited to, provisions for—

(1) To the maximum extent practicable, the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise.

(2) The continuation of collective bargaining rights;

(3) To the maximum extent practicable, the protection of individual employees against a worsening of their positions with respect to their employment;

(4) Maximum efforts to guarantee employment to employees of any State political subdivision thereof who will be affected by any program funded in whole or in part under provisions of the Act; and

(5) Employee training or retraining programs.

(b) *Performance standards.* The terms and conditions of such protective arrangements must include the following performance standards:

(1) *Preservation of rights and benefits.* The preservation of rights and benefits requires that any new job offer to an employee displaced due to alternative community living arrangement services will not result in the termination of accrued benefits, including pension benefits, vacation benefits, health and insurance benefits, seniority rights or similar benefits. This provision applies only to jobs offered by the State or local governments and not to jobs found independently by a terminated employee seeking alternative employment.

(2) *Continuation of collective bargaining rights.* This provision applies when:

(i) The administration of a facility would be turned over from one governmental unit to another (for example, from State to county); and

(ii) An entire employee group would be moved intact to a new facility.

(3) *Worsening of position.* A state cannot fulfill its responsibility to protect an employee against a worsening of his or her position when the job is terminated because of alternative community living arrangement services by offering a job at less pay, lower status, different functions, or with a substantial increase in health or safety hazard, unless such a position is the only one available.

(4) *Assurances of employment.* A displaced State or local government employee must be offered a job that conforms with these requirements if any is available. In order to meet this requirement the State agency shall

initiate policies and procedures to ensure that:

- (i) Affected State and local government employees have transfer rights to employment in community facilities for the developmentally disabled operated by State or local governments;
- (ii) All appropriate job vacancies are posted at locations convenient for employees;
- (iii) Affected employees have the right to transfer to jobs in other State or local government departments;
- (iv) Employees upon transfer to a new place of employment more than 50 miles beyond their previous employment have the right to relocation expenses; and
- (v) Employees who qualify under State civil service have the right to early retirement.

(5) *Training and retraining.* Program policies must provide that training or retraining will be:

- (i) In or near present place of employment of employee;
- (ii) At no expense to employee; and
- (iii) That employee's compensation will not be adversely affected during training.

§ 1386.52 Individual habilitation plans.

(a) The State plan must contain an assurance that each program (including programs of any agency, facility, or project) which receives funds from the State's allotment under this Subpart has a habilitation plan in effect for each developmentally disabled person who receives services from or under the program. The habilitation plan must be reviewed at least annually.

(b) The State plan must describe the methods to be used to facilitate an annual review of the habilitation plan. The State plan must include the following requirements for habilitation plans:

- (1) Be in writing;
- (2) Be developed jointly by—
 - (i) Representative(s) of the program primarily responsible for delivering or coordinating the delivery of services to the person with a developmental disability for whom the plan is established;
 - (ii) The developmentally disabled person; or
 - (iii) Where appropriate, that person's parents, or guardian, or other representative; and
- (3) Be signed by the person or his or her representative, and the principal program representative;
- (4) Contain a statement of the long-term habilitation goals for the person and the intermediate habilitation objectives relating to the attainment of the goals. The objectives shall be

expressed in behavioral or other terms that provide measurable indices of progress;

(5) Describe how the objectives will be achieved and the barriers that might interfere with the achievement of them;

(6) State objective criteria and an evaluation procedure and schedule for determining whether such goals and objectives are being achieved;

(7) Provide for a program coordinator who will be responsible for the implementation of the plan;

(8) Contain a statement (in readily understandable form) of specific habilitation services to be provided, identify the agency which will deliver each service, describe the personnel (and their qualifications) necessary for the provision of those services, and specify the date of the initiation of each service to be provided and the anticipated duration of each service;

(9) Specify the role and objectives of all parties to the implementation of the plan; and

(10) Be reviewed at least annually by the agency which is primarily responsible for delivering or coordinating the delivery of services to the person with developmental disabilities. In the course of the review, the person and the person's parents, or guardian, or other representative shall be given an opportunity to review and participate in revising the plan.

§ 1386.53 Federal financial participation.

(a) Under this Subpart, Federal financial participation is available in costs resulting from obligations incurred under the approved State plan for the necessary expenses of the State council, the administration and operation of the State plan, and training of personnel.

(b) Expenditures which are not allowable for Federal financial participation are—

- (1) Costs incurred by institutions or other residential or non-residential programs which do not comply with § 1385.3 of these regulations;
- (2) Payments made after the end of the fiscal year following the fiscal year in which the underlying obligation was initially incurred (§ 1386.10, Liquidation of obligations);
- (3) Costs incurred for activities not provided for in the approved State plan;
- (4) Costs for construction and renovation of facilities and acquisition of land; and
- (5) Unallowable costs identified in 45 CFR Part 74.

§ 1386.54 Additional information and assurances.

The State plan must contain such additional information and assurances

as the Commissioner may find necessary to carry out the provisions and purposes of this part.

§ 1386.55 Final disapproval of the State plan.

Final disapproval of any State plan will be determined only after the following procedures have been complied with:

(a) The State plan has been submitted to the appropriate HEW Regional Office, and the Regional Office and State have been unable to resolve their differences.

(b) The Regional Office has prepared a detailed written analysis of its reasons for recommending disapproval and has transmitted its analyses and all other relevant material to the Commissioner, and provided the State council and State agency with copies of the material.

(c) The Commissioner, after review of the records and the recommendation of the Regional Office, has determined whether the State plan, in whole or in part, is not approvable. This determination has been sent to the State and contains appropriate references to the records, statutory and regulatory provisions, and all relevant interpretations of applicable laws and regulations. The notification of the decision must inform the State of its right to appeal in accordance with 45 CFR Part 1386, Subpart D.

(d) The Commissioner's decision has been forwarded to the State council and agency by registered mail with a return receipt requested.

(e) A State has filed its request for a hearing with the Assistant Secretary for Human Development Services (ASHDS) within 21 days of the receipt of the decision. The request for a hearing must be sent by registered mail to the ASHDS. The date of mailing the request is considered the date of filing if it is supported by independent evidence of mailing, otherwise the date of receipt shall be considered the date of filing.

Subpart D—Practice and Procedure for Hearings Pertaining to States' Conformity and Compliance with Developmental Disabilities Plans and Federal Requirements

General

§ 1386.80 Definitions

For purposes of this Subpart:

"Assistant Secretary" means the Assistant Secretary for Human Development Services (HDS) or a presiding officer.

"BDD" means Bureau of Developmental Disabilities, Rehabilitation Services Administration

the presiding officer shall briefly state the grounds for denial.

(c)(1) Any interested person or organization wishing to participate as *amicus curiae* shall file a petition with the HDS Hearing Clerk before the commencement of the hearing. Such petition shall concisely state (i) the petitioner's interest in the hearing, (ii) who will represent the petitioner, and (iii) the issues on which petitioner intends to present argument. The presiding officer may grant the petition if he or she finds that the petitioner has a legitimate interest in the proceedings, that such participation will not unduly delay the outcome and may contribute materially to the proper disposition of the issues.

(2) An *amicus curiae* may present a brief oral statement at the hearing at the point in the proceedings specified by the presiding officer. It may submit a written statement of position to the presiding officer prior to the beginning of a hearing, and shall serve a copy on each party. It may also submit a brief or written statement at such time as the parties submit briefs, and shall serve a copy on each party.

Hearing Procedures

§ 1386.100 Who presides.

(a) The presiding officer at a hearing shall be the Assistant Secretary or someone designated by the Assistant Secretary.

(b) The designation of a presiding officer shall be in writing. A copy of the designation shall be served on all parties and *amici curiae*.

§ 1386.101 Authority of presiding officer.

(a) The presiding officer shall have the duty to conduct a fair hearing, avoid delay, maintain order, and make a record of the proceedings. The presiding officer shall have all powers necessary to accomplish these ends, including, but not limited to, the power to:

(1) Change the date, time, and place of the hearing, upon notice to the parties. This includes the power to continue the hearing in whole or in part;

(2) Hold conferences to settle or simplify the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceedings.

(3) Regulate participation of parties and *amici curiae* and require parties and *amici curiae* to state their positions with respect to the issues in the proceeding;

(4) Administer oaths and affirmations;

(5) Rule on motions and other procedural items on matters pending before him or her, including issuance of protective orders or other relief to a party from whom discovery is sought;

(6) Regulate the course of the hearing and conduct of counsel therein;

(7) Examine witnesses;

(8) Receive, rule on, exclude, or limit evidence or discovery;

(9) Fix the time for filing motions, petitions, briefs, or other items in matters pending before him or her;

(10) If the presiding officer is the Assistant Secretary, make a final decision.

(11) If the presiding officer is a hearing examiner, certify the entire record, including recommended findings and proposed decision, to the Assistant Secretary;

(12) Take any action authorized by the rules in this Subpart or 5 U.S.C. 551-559.

(b) The presiding officer does not have authority to compel the production of witnesses, papers, or other evidence by subpoena.

(c) If the presiding officer is a hearing examiner, his or her authority is to render a recommended decision with respect to program requirements which are to be considered at the hearing. In case of any noncompliance, he or she shall recommend whether Federal financial participation should be withheld with respect to the entire State plan or the report of the system description, or whether Federal financial participation should be withheld only with respect to those parts of the program affected by such noncompliance.

§ 1386.102 Rights of parties.

All parties may:

(a) Appear by counsel, or other authorized representative, in all hearing proceedings;

(b) Participate in any prehearing conference held by the presiding officer;

(c) Agree to stipulations of facts which will be made a part of the record.

(d) Make opening statements at the hearing;

(e) Present relevant evidence on the issues at the hearing;

(f) Present witnesses who then must be available for cross-examination by all other parties;

(g) Present oral arguments at the hearing;

(h) Submit written briefs, proposed findings of fact, and proposed conclusions of law, after the hearing.

§ 1386.103 Discovery.

The Department and any party named in the Notice issued pursuant to § 1386.90 shall have the right to conduct discovery (including depositions) against opposing parties as provided by the Federal Rules of Civil Procedure. There shall be no fixed rule on priority of discovery. Upon written motion, the

presiding officer shall promptly rule upon any objection to discovery action. The presiding officer shall also have the power to grant a protective order or relief to any party against whom discovery is sought and to restrict or control discovery so as to prevent undue delay in the conduct of the hearing. Upon the failure of any party to make discovery, the presiding officer may issue any order and impose any sanction other than contempt orders authorized by Rule 37 of the Federal Rules of Civil Procedure.

§ 1386.104 Evidentiary purpose.

The hearing is directed to receiving factual evidence and expert opinion testimony related to the issues in the proceeding. Argument will not be received in evidence; rather, it must be presented in statements, memoranda, or briefs, as directed by the presiding officer. Brief opening statements, which shall be limited to a statement of the party's position and what it intends to prove, may be made at hearings.

§ 1386.105 Evidence.

(a) *Testimony.* Testimony shall be given orally under oath or affirmation by witnesses at the hearing. Witnesses shall be available at the hearing for cross-examination by all parties.

(b) *Stipulations and exhibits.* Two or more parties may agree to stipulations of fact. Such stipulations, or any exhibit proposed by any party, shall be exchanged at the prehearing conference or at a different time prior to the hearing if the presiding officer requires it.

(c) *Rules of evidence.* Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the presiding officer. A witness may be cross-examined on any matter material to the proceeding without regard to the scope of his or her direct examination. The presiding officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues.

§ 1386.106 Exclusion from hearing for misconduct.

Disrespectful, disorderly, or contumacious language or contemptuous conduct, refusal to comply with directions, or continued use of dilatory tactics by any person at the hearing

before a presiding officer shall constitute grounds for immediate exclusion of such person from the hearing by the presiding officer.

§ 1386.107 Un-sponsored written material.

Letters expressing views or urging action and other un-sponsored written material regarding matters in issue in a hearing will be placed in the correspondence section of the docket of the proceeding. These data are not deemed part of the evidence or record in the hearing.

§ 1386.108 Official transcript.

The Department will designate the official reporter for all hearings. The official transcript of testimony taken, together with any stipulations, exhibits, briefs, or memoranda of law filed with them shall be filed with the Department. Transcripts of testimony in hearings may be obtained from the official reporter by the parties and the public at rates not to exceed the maximum rates fixed by the contract between the Department and the reporter. Upon notice to all parties, the presiding officer may authorize corrections to the transcript which involve matters of substance. Transcripts shall be taken by stenotype machine and not by voice recording devices, unless otherwise agreed by all of the parties and the presiding officer.

§ 1386.109 Record for decision.

The transcript of testimony, exhibits, and all papers and requests filed in the proceedings, except the correspondence section of the docket, including rulings and any recommended or initial decision, shall constitute the exclusive record for decision.

Posthearing Procedures, Decisions

§ 1386.110 Posthearing briefs.

The presiding officer shall fix the time for filing posthearing briefs. This time shall not exceed 30 days after termination of the hearing and receipt of the transcript. Briefs may contain proposed findings of fact and conclusions of law. If permitted, reply briefs may be filed no later than 15 days after filing of the posthearing briefs.

§ 1386.111 Decisions following hearing.

(a) If the Assistant Secretary is the presiding officer, he or she shall issue a decision within 60 days after the time for submission of posthearing briefs has expired.

(b)(1) If a hearing examiner is the presiding officer, he or she shall, within 30 days after the time for submission of posthearing briefs has expired, certify the entire record to the Assistant

Secretary including recommended findings and proposed decision. The Assistant Secretary shall serve a copy of the recommended findings and proposed decision upon all parties and amici.

(2) Any party may, within 20 days, file exceptions to the recommended findings and proposed decision and supporting brief or statement with the Assistant Secretary.

(3) The Assistant Secretary shall review the recommended decision and, within 60 days of its issuance, issue his or her own decision.

(c) If the Assistant Secretary concludes:

(1) In the case of a hearing under § 1386.23, § 1386.24 or § 1386.42 that a State plan or report on the State's protection and advocacy system does not comply with Federal requirements, he or she shall also specify whether the State's total allotment for the fiscal year will not be authorized for the State or whether, in the exercise of his or her discretion, the allotment will be limited to parts of the State plan or the report not affected by the noncompliance.

(2) In the case of a hearing pursuant to § 1386.11, that the State is not complying with requirements of the State plan or the report on the description of the State's protection and advocacy system, he or she shall also specify whether Federal financial participation will not be made available to the State or whether, in the exercise of his or her discretion, Federal financial participation will be limited to categories under the State plan or the report on the description of the State's protection and advocacy system not affected by such noncompliance. The Assistant Secretary may ask the parties for recommendations or briefs or may hold conferences of the parties on these questions.

(d) The decision of the Assistant Secretary under this Section shall be the final decision of the Secretary and shall constitute "final agency action" within the meaning of 5 U.S.C. 704 and the "Secretary's action" within the meaning of Section 138 of the Act. The Assistant Secretary's decision shall be promptly served on all parties and amici.

§ 1386.112 Effective date of decision by the Assistant Secretary.

(a) If, in the case of a hearing pursuant to § 1386.11, the Assistant Secretary concludes that a State plan or the report on the description of the State's protection and advocacy system does not comply with Federal requirements, and the decision provides that the allotment will be authorized but limited to parts of the State plan or the report on the description of the State's

protection and advocacy system not affected by such noncompliance, the decision shall specify the effective date for the authorization of the allotment.

(b) In the case of a hearing pursuant to § 1386.23, § 1386.24, or § 1386.42, if the Assistant Secretary concludes that the State is not complying with requirements of the State plan or the report on the description of the State's protection and advocacy system, the decision that further payments will not be made to the State, or that payments will be limited to parts of the State plan or the report on the description of the State's protection and advocacy system, not affected, shall specify the effective date for the withholding of Federal funds.

(c) The effective date shall not be earlier than the date of the decision of the Assistant Secretary and shall not be later than the first day of the next calendar quarter.

(d) The provisions of this section may not be waived pursuant to § 1386.84.

PART 1387—SPECIAL PROJECTS.

3. Part 1387 is revised to read as follows:

Sec

- 1387.1 Purposes of projects.
- 1387.2 Projects of national significance.
- 1387.3 Eligible applicants.
- 1387.4 Application content and procedure.
- 1387.5 Amount of grant.

Authority: Section 109, Pub. L. 88-164, as amended by Pub. L. 95-602.

§ 1387.1 Purposes of projects.

Special project grants may be made by the Commissioner to support a variety of means of increasing the effectiveness and efficiency of services provided under the two State formula grant programs. Not less than 25 percent of the appropriation under Sec. 145(f) of the Act must be used for projects of national significance, defined in § 1387.2.

(a) Special project grants may be made to assist in meeting the costs of conducting an activity or program (referred to here as a "Project") for—

(1) Demonstrations, including research, training, technical assistance and evaluation, for establishing programs to expand or otherwise improve services, particularly priority services, to persons with developmental disabilities who are disadvantaged or multi-handicapped;

(2) Demonstrations for establishing programs which hold promise of expanding or otherwise improving the State protection and advocacy systems. These demonstration projects may include research, training, and technical

assistance, and evaluation in connection with the service.

(b) Applications for grants under (a) may request assistance to carry out one or more of the following activities for developmentally disabled people:

(1) Public awareness and public education programs to assist in the elimination of social, attitudinal, and environmental barriers;

(2) Coordinating and using all available community resources to meet needs of recipients (especially those with disadvantaged backgrounds);

(3) Demonstrations of the provision of services to recipients disadvantaged because of their economic status;

(4) Technical assistance relating to planning, administration, services, and facilities;

(5) Training of specialized personnel needed for the provision of services for research directly related to such training;

(6) Developing or demonstrating new or improved techniques for the provision of services, including model integrated service projects;

(7) Gathering and disseminating information relating to developmental disabilities;

(8) Improving the quality of services; and

(9) Developing or demonstrating innovative methods to attract and retain professionals to serve in rural areas.

§ 1387.2 Projects of national significance.

(a) In order for a project to qualify as a project of national significance, it must be—

(1) Designed to have a major impact on developmental disabilities programs throughout the country;

(2) Have an objective which, if achieved, could be replicated and result in an improved delivery system for developmental disabilities services, or affect national policies or standards; or

(3) Involve activities to be conducted in a number of sites in various parts of the country as part of a unified program.

§ 1387.3 Eligible applicants.

Applications may be made by public and other non-profit agencies, organizations, and institutions of higher education, including community and junior colleges.

§ 1387.4 Application content and procedure.

(a) Priorities for projects to be funded will be announced, and criteria for judging applications will be listed in program announcements published from time to time in the *Federal Register*.

(b) Applications for grants must be submitted in accordance with

procedures and deadline dates, as prescribed by the Commissioner in program announcements.

(c) The applicant shall provide a copy of the application for a grant under this subpart, except for projects of national significance, to the appropriate State planning council for review and comment, at the same time it submits the application to the Commissioner. The State planning council must submit its comments to the Commissioner with regard to a particular application within 30 days from the date of submission by the applicant in order to assure consideration of such comments.

§ 1387.5 Amount of grant.

The amount of any grant shall be determined by the Commissioner. In determining the amount of any grant under this Subpart, the Commissioner will exclude the amount of any other Federal grant for the project. The amount of any non-Federal funds required to be expended as a condition of any other Federal grant will be excluded from the cost of a grant under this Subpart.

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REGULATIONS CONCERNING
VOCATIONAL REHABILITATION SERVICES

45 C.F.R. §§ 1361.110-1361.128*

20 C.F.R. §§ 416.1701-416.1731

*With the organization of the new U.S. Department of Education, All regulations concerning education have been recodified. Regulations formerly codified at 45 C.F.R. Part 1361 now appear at 34 C.F.R. Part 361. See 45 Fed. Reg. 77368 (November 21, 1980).

Subpart D—Payment of Costs of Vocational Rehabilitation Services for Disability Beneficiaries From the Social Security Trust Funds

§ 1361.110 General.

(a) Section 222 of the Social Security Act provides for the payment from the trust funds of costs of vocational rehabilitation services furnished to disability beneficiaries. Within the limits authorized under section 222, trust funds will be available for payment by the Commissioner to the States to provide for vocational rehabilitation services (and related costs of administration) for disability beneficiaries under State plans approved under the Act.

(b) To receive trust funds for vocational rehabilitation, each State agency is required to submit an amendment to its State plan which sets forth its policy and procedures for providing vocational rehabilitation services to disability beneficiaries in keeping with the purpose as stated below and which meets the requirements and conditions prescribed herein.

§ 1361.111 Purpose.

With the purpose of making it possible for more disability beneficiaries to receive vocational rehabilitation services, money is made available from the trust funds to finance the vocational rehabilitation of selected beneficiaries. This money will be used in such a way that the saving from the amount of benefits that would otherwise have to be paid and the increased contributions to the trust funds paid by virtue of the earnings of beneficiaries who return to work will exceed, or at least equal, the money paid from the trust funds for rehabilitation costs.

§ 1361.112 Applicability of other regulations.

The provisions governing vocational rehabilitation services to disability beneficiaries, the costs of which are

paid from trust funds, must conform to all requirements elsewhere in this part governing the State vocational rehabilitation programs which are not inconsistent with the requirements prescribed in this subpart.

§ 1361.113 Definitions.

(a) "Disability beneficiary" means a disabled individual who is entitled to benefits under section 223 of the Social Security Act (including disabled individuals serving a waiting period prior to such entitlement), a disabled individual age 18 or over who is entitled to child's insurance benefits under section 202(d) of the Social Security Act, or a disabled widow, widower, or surviving divorced wife under sections 202 (e) and (f) of the Social Security Act.

(b) "Productive activity" means full-time employment, part-time employment, or self-employment wherein the nature of the work activity performed, the earnings received, or both, or the capacity to engage in such employment or self-employment, can reasonably be expected to result in the termination of entitlement to disability insurance benefits or in the nonpayment of benefits where entitlement is based on statutory blindness.

(c) "Trust Funds" means funds derived from the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund for purposes of vocational rehabilitation pursuant to section 222(d) of the Social Security Act.

§ 1361.114 State plan requirements.

For a State to receive trust funds the State plan must contain the following provisions regarding vocational rehabilitation services to disability beneficiaries.

(a) *Conformance to selection criteria.* The State plan shall provide that, to the extent funds provided from the trust funds are adequate for that purpose, vocational rehabilitation services will be furnished to disability beneficiaries in the State who the State de-

termines on the basis of medical, vocational, social, personal, or other factors are eligible for services and who meet the following requirements:

(1) The disabling impairment is not so rapidly progressive as to outrun the effect of vocational rehabilitation services to the extent that restoration of the beneficiary to productive activity is precluded;

(2) The disabling effect of the impairment, without the services planned, is expected to remain at a level of severity which would result in the continuing payment of disability benefits;

(3) There is a reasonable expectation that the provision of services will enable the individual to engage in productive work activity; and

(4) The reasonably predictable period of productive work activity is of sufficient duration that the benefits to be saved and the contributions which would be paid to the trust funds on future earnings would offset the cost of the services planned.

(b) *Order of selection.* To the extent that funds provided for this purpose are adequate, the State plan shall provide that the order of selection for services shall be in accordance with the beneficiary's readiness and potential for rehabilitation to productive activity and without regard to any other order of selection set forth in the State plan.

(c) *Citizenship, residence, and economic need.* The State plan shall provide that any disability beneficiary who meets the other requirements for selection for vocational rehabilitation services shall be provided with authorized services without regard to

- (1) Citizenship, or
- (2) Place of residence, or
- (3) Need for financial assistance.

(d) *Promptness of services.* The State plan shall provide that services will be furnished with reasonable promptness to disability beneficiaries selected under paragraphs (a), (b), and (c) of this section.

(e) *Services available.* The State plan shall provide that vocational rehabilitation services available to disability beneficiaries selected for such services shall include the full range of services authorized in the Act, to the

extent that such services are consistent with this subpart, subject to the conditions and limitations with respect to the use of trust funds prescribed in § 1361.115.

(f) *Staff, supervision and training.* The State plan shall provide for staff, supervision, and training of personnel to carry out the functions of this subpart in an effective manner.

§ 1361.115 Conditions and limitations.

Costs of vocational rehabilitation services (and administration) paid from trust funds shall be subject to the following conditions and limitations:

(a) Trust funds will not be used to pay costs of establishment or construction of a rehabilitation facility.

(b) Trust funds will not be used to pay the costs of maintenance while an individual is receiving vocational rehabilitation services unless it is necessary for the individual to be away from home to receive such services. The costs of such maintenance shall not exceed the amount of increased expenses that are necessitated by the rehabilitation program.

(c) Where trust funds are used to pay the cost of equipment, initial stock and supplies, including that for a vending stand or other small business enterprise, for the rehabilitation of a beneficiary, the State agency shall establish appropriate controls to assure that such equipment and stock no longer required by that beneficiary are utilized by another beneficiary. When it is unlikely that such equipment and stock will be needed by another beneficiary within a reasonable period of time, it may be disposed of according to usual State agency procedures with appropriate credit to the trust funds.

§ 1361.116—Payments of trust funds.

(a) *Payment and distribution of funds.* (1) Payment from available trust funds may be made in advance or by way of reimbursement for agency costs of providing services (including administration) under an approved amended State plan.

(2) In distributing funds to the States, the Commissioner will consider agency estimates, the number of disability beneficiaries in the State, and

such other factors as the Secretary may determine.

(3) The Commissioner will make necessary adjustments or redistribution on account of overpayments, underpayments, and unused funds.

(b) *Payments for services and administration.* (1) Payment from trust funds may be made for the cost of determining the eligibility for and the character of vocational rehabilitation services needed by a disability beneficiary, or a claimant for disability benefits, if it appears there is a strong likelihood that such claimant will be found entitled to such disability benefits (even though later it is not so found), to the extent that such costs were incurred with respect to such claimant prior to the receipt by the State agency of notice of a determination of nonentitlement.

(2) Other authorized services provided prior to determination of entitlement to persons meeting the selection criteria may be paid for from trust funds if and when the State agency receives notice that the individual has been determined to be entitled to disability benefits.

(3) In no case, however, may services be paid for from the trust funds which are provided before

(i) The effective date of the approved amended State plan,

(ii) The beginning of the period of disability, or

(iii) The filing of application for disability benefits, whichever is latest, or in the case of a disabled child the date of entitlement to child's benefits because of disability.

(c) *Reversal of determination of non-entitlement for disability benefits.* Payment from the trust funds for services which have been rendered to a claimant otherwise eligible therefor who has been found not entitled to disability benefits may, if such finding is later reversed on reconsideration, appeal, or judicial review, be made retroactively for the fiscal year in which notice of the reversal is received by the State agency, provided at that time services consistent with the purpose of this subpart are being currently rendered to the claimant.

(d) *Termination of disability benefits.* Payment for services after receipt

by the State agency of notice that entitlement to disability benefits has terminated shall not be made from trust funds, except when the services have been started and the individual case plan reflects that commitments of monies were made for those services prior to receipt of notice of such termination, i.e., written contracts, purchase orders, or equivalent authorizations have been issued, or lump sum payment may have been required to have been made in advance such as in the case of tuition or training expenses. In no case may payment be made for costs of services extending more than four months after the month in which entitlement to disability benefits terminates or in which notice that entitlement to disability benefits has terminated is received by the State agency, whichever is later.

§ 1361.117 Budgets.

Periodically, as may be required, the State shall prepare and submit a budget estimate of trust funds needed to pay the costs of vocational rehabilitation services for disability beneficiaries and for the administration of such services.

§ 1361.118 Reports.

The State shall submit reports of expenditures and case services activities in behalf of beneficiaries, in such form and in such detail and frequency as determined necessary by the Commissioner. All records, procedures, and operational activities of the State agency, the costs of which are paid from trust funds shall be subject to evaluative study, inspection, review, and audit.

Subpart E—Vocational Rehabilitation Services for Supplemental Security Income Recipients

§ 1361.120 General.

(a) Section 1615 of the Social Security Act provides for the referral of blind or disabled supplemental security income recipients who are under age 65 to the appropriate State agency administering the State plan for vocational rehabilitation services approved under the Rehabilitation Act of 1973

and for a periodic review of their need for and utilization of available vocational rehabilitation services. Individuals so referred must accept such vocational rehabilitation services as are made available, unless there is good cause to refuse. Authorization is provided to pay the State agency the costs incurred in the provision of such services to individuals so referred.

(b) Funds appropriated under this authority will be made available for payment by the Commissioner for vocational rehabilitation services (and related costs of administration) provided under the State plan approved under the Rehabilitation Act of 1973.

(c) To receive Federal funds for services under this subpart, each State agency is required to submit an amendment to its State plan which sets forth the policies and procedures for providing services to blind and disabled recipients in keeping with the purpose as stated below and which meets the requirements and conditions prescribed herein.

§ 1361.121 Purpose.

The purpose of the provision of vocational rehabilitation services as authorized in this subpart is to enable a maximum number of recipients to increase their employment capacity to the extent that they can engage in productive activity.

§ 1361.122 Applicability of other regulations.

The provisions governing vocational rehabilitation services to supplemental security income recipients, the costs of which are paid from supplemental security income program funds, must conform to all requirements elsewhere in this part governing the State vocational rehabilitation programs which are not inconsistent with the requirements prescribed in this subpart.

§ 1361.123 Definitions.

(a) "Supplemental security income recipient", or "recipient", as used in this subpart, means an individual who is receiving cash payments (or with respect to whom payments are made) under the supplemental security income program based on blindness or disability.

(b) "Productive activity" means full-time employment, part-time employment, or self-employment wherein the nature of the work activity performed, the earnings received, or both, or the capacity to engage in such employment or self-employment, can reasonably be expected to result in termination of eligibility for supplemental security income payments, or at least a substantial reduction of such payments in accord with income exclusions applying to the blind as specified in 20 CFR Part 416, Subpart K.

§ 1361.124 State plan requirements.

For a State to receive Federal funds appropriated for this purpose, the State plan must contain the following provisions regarding vocational rehabilitation services to supplemental security income recipients.

(a) *Conformance to selection criteria.* The State plan shall provide that, to the extent funds appropriated are adequate for the purpose, vocational rehabilitation services will be furnished to recipients in the State who the State determines on the basis of medical, vocational, social, personal, or other factors are eligible for services and who meet the following requirements:

(1) The disabling impairment is not so rapidly progressive as to outrun the effect of vocational rehabilitation services to the extent that restoration of the recipient to productive activity is precluded;

(2) The disabling effect of the impairment, without the services planned, is expected to remain at a level of severity which would result in the continuing eligibility of the recipient;

(3) There is a reasonable expectation that the provision of services will enable the individual to engage in productive activity; and

(4) The reasonably predictable period of productive work activity is of sufficient duration that the expenditures made for services are expected to be offset by the non-payment or substantial reduction of supplementary security income payments which otherwise would be made to the individual.

(b) *Order of selection.* To the extent that the funds appropriated for this purpose are adequate, the State plan shall provide that the order of selection for services shall be in accordance with the recipient's readiness and potential for rehabilitation to productive activity and without regard to any other order of selection set forth in the State plan.

(c) *Economic need test.* The State plan shall provide that any recipient who meets the other requirements for vocational rehabilitation services through the use of supplemental security income program funds shall be provided authorized services without regard to any economic need test set forth in the State plan.

(d) *Promptness of services.* The State plan shall provide that services will be furnished with reasonable promptness to recipients selected under paragraphs (a), (b), and (c) of this section.

(e) *Services available.* The State plan shall provide that vocational rehabilitation services available to recipients selected for such services shall include the full range of services authorized in the Act, to the extent that such services are consistent with the purpose of this subpart, and subject to the limitations with respect to the use of supplemental security income program funds prescribed in § 1361.125.

(f) *Staff, supervision and training.* The State plan shall provide for staff, supervision, and training of personnel to carry out the functions of this subpart in an effective manner.

§ 1361.125 Conditions and limitations.

Costs of vocational rehabilitation services (and administration) paid from supplemental security income program funds shall be subject to the following conditions and limitations:

(a) Supplemental security income program funds will not be used to pay costs of establishment or construction of a rehabilitation facility.

(b) Supplemental security income program funds will not be used to pay the costs of maintenance while an individual is receiving vocational rehabilitation services unless it is necessary for the individual to be away from home to receive such services. The

costs of such maintenance shall not exceed the amount of increased expenses that are necessitated by the rehabilitation program.

(c) Where supplemental security income program funds are used to pay the cost of equipment, initial stock and supplies, including that for a vending stand or other small business enterprise, for the rehabilitation of a recipient, the State agency shall establish appropriate controls to assure that such equipment and stock no longer required by that recipient are utilized by another recipient. When it is unlikely that such equipment and stock will be needed by another recipient within a reasonable period of time, it may be disposed of according to usual State agency procedures with appropriate credit to the supplemental security income program funds.

§ 1361.126 Payments of supplemental security income program funds.

(a) *Payment and distribution of funds.* (1) Payment from available funds may be made in advance or by way of reimbursement for agency costs of providing services (including administration) under an approved amended State plan.

(2) In distributing funds, to the States, the Commissioner will consider agency estimates, the number of recipients in the State, and such other factors as the Commissioner may determine.

(3) The Commissioner will make necessary adjustments or redistribution on account of overpayments, underpayments, and unused funds.

(b) *Payments for services and administration.* (1) Payment from supplemental security income program funds may be made for the cost of determining the eligibility for and the character of vocational rehabilitation services needed by a recipient, or an applicant for supplemental security income payments, if it appears there is a strong likelihood that such applicant will be found eligible for supplemental security income (even though later it is not so found), to the extent that such costs were incurred with respect to such applicant prior to the receipt by the State agency of notice of a determination of ineligibility.

(2) Other authorized services provided prior to determination of eligibility for supplemental security income payments to persons meeting the selection criteria may be paid for from supplemental security income program funds if and when the State agency receives notice that the individual has been determined to be eligible for such payments.

(3) In no case, however, may services be paid from supplemental security income program funds which are provided before: (i) the effective date of the approved amended State plan, or (ii) the beginning date of the individual's eligibility for supplemental security income payments, whichever is later.

(c) *Reversal of determination of ineligibility for supplemental security income payments.* Payment from supplemental security income program funds for services which have been rendered to an applicant otherwise eligible therefore who has been found not-eligible for supplemental security income payments may, if such finding is later reversed on reconsideration, appeal, or judicial review, be made retroactively for the fiscal year in which notice of the reversal is received by the State agency, provided at that time services consistent with the purpose of this subpart are being currently rendered to the recipient.

(d) *Termination of supplemental security income payments.* Payment for services after receipt by the State agency of notice that eligibility for supplemental security income payments has terminated shall not be made from supplemental security income program funds, except when the services have been started and the individual case plan reflects that commitments of monies were made for those services prior to receipt of notice of such termination, i.e., written contracts, purchase orders, or equivalent authorizations have been issued, or lump sum payment may have been required to have been made in advance such as in the case of tuition or training expenses. In no case may payment be made for costs of services extending more than four months after the month in which eligibility for supplemental security income payments ter-

minates or in which notice that eligibility for supplemental security income payments has terminated is received by the State agency, whichever is later.

§ 1361.127 Budgets.

Periodically, as may be required, the State shall prepare and submit a budget estimate of supplemental security income program funds needed to pay the costs of vocational rehabilitation services for recipients and for the administration of such services.

§ 1361.128 Reports.

The State shall submit reports of expenditures and case services activities in behalf of recipients, in such form and in such detail and frequency as determined necessary by the Commissioner. All records, procedures, and operational activities of the State agency, the costs of which are paid from supplemental security income program funds, shall be subject to evaluative study, inspection, review, and audit.

Subpart P—[Reserved]

Subpart Q—Referral for Rehabilitation Services, Other Benefits, Other Services, and Assistance

AUTHORITY: Secs. 1102, 1611(e)(3)(A), 1615, and 1631 of the Social Security Act, as amended, 49 Stat. 647, as amended, 86 Stat. 1466, 1474, and 1475 (42 U.S.C. 1302, 1382(e)(3)(A), 1382d, and 1383).

SOURCE: 39 FR 40012, Nov. 13, 1974, unless otherwise noted.

§ 416.1701 Scope of subpart.

This Subpart Q contains provisions:

(a) Implementing section 1615 of the Act (42 U.S.C. 1382d) with respect to referrals of blind or disabled recipients for vocational rehabilitation services;

(b) Implementing section 1611(e)(3) of the Act (42 U.S.C. 1382(e)(3)) with respect to the referral of disabled individuals medically determined to be drug addicts or alcoholics for appropriate treatment, where available, at an institution or facility approved for such purpose; and

(c) Implementing the provisions of sections 1612(b)(4)(A)(iii), 1612(b)(4)(B)(ii), and 1613(a)(4) of the Act (42 U.S.C. 1382a(b)(4)(a)(iii), 1382a(b)(4)(B)(ii), and 1382b(a)(4)) with respect to the exclusion of countable income and resources of a blind or disabled individual necessary to fulfill a plan for achieving self-support.

§ 416.1703 Referral of blind and disabled individuals for vocational rehabilitation services.

A disabled or blind individual under age 65 and receiving benefits under this part will be referred to the appropriate State agency administering the State plan for vocational rehabilitation services approved under the Rehabilitation Act of 1973 (see also 45 CFR 401.120ff published at 39 FR 25436, July 10, 1974) for a review of his need for and utilization of available vocational rehabilitation services. Such referrals will be made: (a) At the time it is determined that an individual is eligible for benefits based on disability or blindness; and (b) at such other times as may be scheduled according to individual circumstances.

§ 416.1705 Ineligibility for benefits because of refusal to accept vocational rehabilitation services.

A disabled or blind individual under age 65, who is receiving benefits under this part, and who has been referred to an appropriate State agency administering a State plan for vocational rehabilitation shall not be eligible for benefits for any month in which he refuses, without good cause, to accept vocational rehabilitation services available to him under a State plan approved under the Rehabilitation Act of 1973 (see § 416.1328(a)).

§ 416.1707 Good cause for refusal of vocational rehabilitation services.

(a) An individual may refuse to accept vocational rehabilitation services and continue to be eligible for benefits if his refusal is based on good cause. For example, an individual has good cause for refusing vocational rehabilitation services where:

(1) The person is receiving rehabilitation services under another governmental or private plan which may be expected to restore his ability to engage in substantial gainful activity; or he is a student regularly attending a school, college, or university, or a course of vocational or technical training designed to prepare him for gainful employment.

(2) The services offered would conflict with the person's prescribed medical regimen.

(3) The person is physically or mentally incapable of accepting the services offered.

(4) The training or other services for which he has been found eligible is not designed to restore him to substantial gainful activity.

(5) The individual is a member or adherent of any recognized church or religious sect which teaches its members or adherents to rely solely, in the treatment and care of any physical or mental impairment, on prayer or spiritual means through the application and use of the tenets or teachings of such church or sect; and his refusal to accept rehabilitation services was due solely to his adherence to the teachings or tenets of his church or sect.

(b) A recipient claiming to have good cause for refusal of vocational rehabilitation services has the burden of establishing such good cause.

§ 416.1710 Referral of drug addicts and alcoholics for treatment.

An individual under age 65 and not blind who is determined to be disabled and is medically determined to be a drug addict or alcoholic (see § 416.981) will be referred to an approved institution or facility (see § 416.984) for appropriate and available treatment of his drug addiction or alcoholism.

§ 416.1711 Refusal to accept treatment for drug addiction or alcoholism.

An individual described in § 416.1710 who has been referred for appropriate, available treatment shall not be eligible for benefits for any month in which he refuses to accept appropriate and available treatment for his drug addiction or alcoholism (see § 416.1326).

§ 416.1731 Exclusion of income, resources, or income and resources of the blind and disabled pursuant to approved plans for achievement of self-support.

(a) *General.* Achievement of self-support by the needy blind or disabled is a primary objective of the supplemental security income program. Section 1612(b)(4) (A) and (B) of the Social Security Act provides for the exclusion from the countable income of a blind or disabled individual, of the income necessary to fulfill a plan for achieving self-support. Section 1613(a)(4) of the Act provides for the exclusion from such an individual's countable resources of resources necessary to fulfill a plan for achieving self-support.

(b) For purposes of the income and resources exclusions described in paragraph (a) of this section:

(1) *Approval of a plan.* The plan must be an individual plan, in writing, and approved by the Social Security Administration.

(2) *Elements of an approved plan for achieving self-support.* The plan must contain specific, savings and/or planned disbursement goals for a designated occupational objective; there must be identification and segregation of such money and other resources as are being accumulated and conserved toward this goal.

(3) *Adherence to the plan.* The individual's adherence to the provisions of the plan for self-support is required for its continuing applicability.

(c) *Duration of an approved plan.* An approved plan for achieving self-support is limited to an initial period of 18 months. An extension for an additional period of up to 18 months may be granted where the Social Security Administration determines that such extension is required to achieve the goals of the previously approved plan for self-support; approval of a total period of up to 48 months is possible when the plan includes an educational goal which extends beyond the initial and extension periods.

(d) *Assistance in development of plan.* Upon request, an applicant for whom a plan for achieving self-support has not been approved by the Social Security Administration prior to the determination by the Social Security Administration that he is disabled or blind, shall receive all necessary assistance in expediting the referral of such individual for the development of such plan by the State vocational rehabilitation agency or the State agency for the blind, as appropriate. Such assistance shall be provided the applicant at the time of and in conjunction with his referral to such agency for rehabilitation or blind services.

(e) *State approved plans.* Despite the requirements of paragraph (b) of this section, a plan for achieving self-support approved by an agency administering a State plan under the provisions of title X, XIV, or XVI of the Social Security Act and still in effect at the time the blind or disabled individual otherwise becomes eligible for supplemental security income payments shall be considered to be an approved plan to achieve self-support and a basis for exclusion of income, resources, or income and resources, according to the terms and conditions of such plan for so long as such plan continues to be applicable to such individual, not to exceed the time periods specified in paragraph (c) of this section.

[39 FR 29589, Aug. 16, 1974]

HEW, EDUCATION DIVISION GENERAL
ADMINISTRATIVE REGULATIONS (EDGAR)

45 FEDERAL REGISTER 22494 (April 3, 1980)*

*With the organization of the new U.S. Department of Education, all regulations concerning education have been recodified. Regulations formerly codified at 45 C.F.R. Parts 100a, 100b, and 100c have been recodified at 34 C.F.R. Parts 75, 76, and 77, respectively. See 45 Fed. Reg. 77368 (November 21, 1980).

Education Division General Administrative Regulations (EDGAR)**AGENCY:** Education Division, HEW.**ACTION:** Final regulations.

SUMMARY: The Education Division, HEW, issues these general regulations to apply to direct grant and State-administered programs administered by the Education Division, and these general definitions to apply to all programs of the Education Division. The statutory authority for the regulations is the General Education Provisions Act and the statutes that authorize the programs covered.

These regulations provide general rules on how to apply for grants and subgrants, how grants and subgrants are made, the general conditions that apply to grantees and subgrantees, the administrative responsibilities of grantees and subgrantees, and the compliance procedures used by the Education Division. Rules that apply only to a particular program will be included in separate regulations for that program.

EFFECTIVE DATE: These regulations are expected to take effect 45 days after they are transmitted to Congress. Regulations are usually transmitted to Congress several days before they are published in the Federal Register. The effective date is changed by statute if Congress disapproves the regulations or takes certain adjournments. If you want to know the effective date of these regulations, call or write the Education Division contact person.

EDGAR contains three parts—100a, for direct grant programs; 100b, for State-administered programs; and 100c, general definitions for all programs. Part 100e, the procedures for the Education Appeal Board, was published as interim final regulations in the Federal Register on May 23, 1979 (44 FR 30523). It is published in final in today's Federal Register and renumbered as Part 100d.

EDGAR will remain in effect under the Department of Education Organization Act. Technical changes necessary because of the new Department of Education will be made at a future date. *

PART 100B—STATE-ADMINISTERED PROGRAMS**Subpart A—General****Regulations that Apply to State-Administered Programs**

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* On November 21, 1980, all education regulations were recodified. These regulations, which formerly appeared at 45 C.F.R. Parts 100a, 100b, and 100c have been recodified to 34 C.F.R. Parts 75, 76, and 77, respectively. See 45 Fed. Reg. 77368 (Nov. 21, 1980).

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§ 100b.1 Programs to which Part 100b applies.

{P.L. 94-142 (20 U.S.C. §§1411-1418, 1420) and State Operated Programs for Handicapped Children

(20 U.S.C. §§ 2771-2772) are both covered under Part 100b]

Subpart B—How a State Applies for a Grant

State Plans and Applications

§ 100b.100 Effect of this subpart

This subpart establishes general requirements that a State must meet to apply for a grant under a program listed in § 100b.1. Additional requirements are in the authorizing statute and the implementing regulations for the program.

(20 U.S.C. 1221e-3(e)(1))

§ 100b.101 The general State application

(a) This section applies to the programs listed in § 100b.1 under which a State educational agency may make subgrants to local educational agencies.

(b)(1) A State shall submit to the Commissioner a general application that contains the assurances contained in paragraph (e) of this section.

(2) The State may submit—

- (i) A single general application to cover all of the programs; or
- (ii) More than one general application, each general application covering either a group of programs or an individual program.

(c) A general application must be approved by each official, agency, board, or other entity within the State that, under State law, is primarily responsible for supervision of the activities conducted under each program covered by the application.

(d) Each general application submitted under this section remains in effect for the duration of any program it covers. The Commissioner does not require the resubmission or amendment of that application unless required by changes in Federal or State law or by other significant changes in the circumstances affecting an assurance in that application.

(e) A general application must include assurances satisfactory to the Commissioner—

- (1) That each program will be administered in accordance with all applicable statutes, regulations, State plans, and applications;
- (2) That the control of funds provided under each program and title to property acquired with program funds will be in a public agency, or in a nonprofit private agency, institution, or organization if the statute authorizing the program provides for grants to those entities, and that the public agency or nonprofit private

agency, institution, or organization will administer the funds and property;

(3) That the State will adopt and use proper methods of administering each program, including—

- (i) Monitoring of agencies, institutions, and organizations responsible for carrying out each program, and the enforcement of any obligations imposed on those agencies, institutions, and organizations under law;

(ii) Providing technical assistance, if necessary, to those agencies, institutions, and organizations;

(iii) Encouraging the adoption of promising or innovative educational techniques by those agencies, institutions, and organizations;

(iv) The dissemination throughout the State of information on program requirements and successful practices; and

(v) The correction of deficiencies in program operations that are identified through monitoring or evaluation;

(4) That the State will evaluate the effectiveness of each program in meeting statutory objectives—not less often than once every three years—and that the State will cooperate in carrying out any evaluation of a program conducted by or for the Secretary or other Federal official;

(5) That the State will use fiscal control and fund accounting procedures that will ensure proper disbursement of, and accounting for, Federal funds paid to the State under each program;

(6) That the State will—

- (i) Make reports to the Commissioner—including reports on the results of evaluations required under paragraph (e)(4) of this section—as may reasonably be necessary to enable the Commissioner to perform his or her duties under each program; and
- (ii) Maintain records, in accordance with the requirements of Section 437 of GEPA—and afford access to those records as the Commissioner may find necessary to carry out his or her duties; and

(7) That the State will provide reasonable opportunities for the participation by local agencies, representatives of the class of individuals affected by each program, and other interested institutions, organizations, and individuals in the planning for and operation of each program, including the following:

(i) The State will consult with relevant advisory committees, local agencies, interest groups, and experienced professionals in the development of State plans.

(ii) The State will publish each proposed State plan, in a manner that will ensure circulation throughout the State, at least 60 days prior to the date on which the plan is submitted to the

Commissioner or on which the plan becomes effective, whichever occurs earlier, with an opportunity for public comments on the plan to be accepted for at least 30 days.

(iii) The State will hold public hearings on the proposed State plans if required by the Commissioner by regulation.

(iv) The State will provide an opportunity for interested agencies, organizations, and individuals to suggest improvements in the administration of the program and to allege that there has been a failure by any entity to comply with applicable statutes and regulations. (20 U.S.C. 1223d)

§ 100b.102 Definition of "State plan" for Part 100b.

As used in this part, "State plan" means any of the following documents that a State submits to the Commissioner under a program listed in § 100b.1:

(l) *Handicapped children.* The State plan under Part B of the Education of the Handicapped Act.

(m) *Handicapped children.* The application under Section 619 of the Education of the Handicapped Act.

§ 100b.103 Three-year State plans.

(a) Beginning no later than fiscal year 1981, each State plan will be effective for a period of three fiscal years, unless the program regulations provide for a longer effective period.

(b) If the Commissioner determines that the three-year State plans under a program should be submitted by the States on a staggered schedule, the Commissioner may require groups of States to submit or resubmit their plans in different years.

§ 100b.104 A State shall include certain certifications in its State plan.

(a) A State shall include the following certifications in each State plan:

(1) That the plan is submitted by the State agency that is eligible to submit the plan.

(2) That the State agency has authority under State law to perform the functions of the State under the program.

(3) That the State legally may carry out each provision of the plan.

(4) That all provisions of the plan are consistent with State law.

(5) That a State officer, specified by title in the certification, has authority under State law to receive, hold, and disburse Federal funds made available under the plan.

(6) That the State officer who submits the plan, specified by title in the certification, has authority to submit the plan.

(7) That the agency that submits the plan has adopted or otherwise formally approved the plan.

(8) That the plan is the basis for State operation and administration of the program.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.105 The Governor has 45 days to comment on the State plan.

(a) Before a State submits a State plan to the Commissioner, the State shall give its Governor 45 days to comment on the plan.

(b) The State shall attach to the plan any comments the Governor makes.

(c) If the Governor does not comment, the official who submits the State plan shall certify that—

(1) The State submitted the plan to the Governor at least 45 days before submitting it to the Commissioner; and

(2) The Governor did not comment.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.106 State documents are public information.

A State shall make the following documents available for public inspection:

(a) All State plans and related official materials.

(b) All approved subgrant applications.

(c) All documents that the Commissioner transmits to the State regarding a program.

(20 U.S.C. 1221e-3(a)(1))

Amendments

Cross-reference.—See 45 CFR Part 74, Subpart L—Programmatic Changes and Budget Revisions.

§ 100b.140 Amendments to a State plan.

(a) If the Commissioner determines that an amendment to a State plan is essential during the effective period of the plan, the State shall make the amendment.

(b) A State shall also amend a State plan if there is a significant and relevant change in—

(1) The information or the assurances in the plan;

(2) The administration or operation of the plan; or

(3) The organization, policies, or operations of the State agency that received the grant, if the change materially affects the information or assurances in the plan.

(20 U.S.C. 1221e-3(a)(1); 1231g(a))

§ 100b.141 An amendment requires the same procedures as the document being amended.

If a State amends a State plan under § 100b.140, the State shall use the same procedures as those it must use to prepare and submit a State plan.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.142 An amendment is approved on the same basis as the document being amended.

The Commissioner uses the same procedures to approve an amendment to a State plan—or any other document a State submits—as the Commissioner uses to approve the original document.

(20 U.S.C. 1221e-3(a)(1))

Subpart C—How a Grant is Made to a State

Approval or Disapproval by the Commissioner

§ 100b.201 A State plan must meet all statutory and regulatory requirements.

The Commissioner approves a State plan if it meets the requirements of the Federal statutes and regulations that apply to the plan.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.202 Opportunity for a hearing before a State plan is disapproved.

The Commissioner may disapprove a State plan only after—

(a) Notifying the State;

(b) Offering the State a reasonable opportunity for a hearing; and

(c) Holding the hearing, if requested by the State.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.235 The notification of grant award.

(a) To make a grant to a State, the Commissioner issues and sends to the State a notification of grant award.

(b) The notification of grant award tells the amount of the grant and provides other information about the grant.

(20 U.S.C. 1221e-3(a)(1))

Allotments and Reallotments of Grant Funds

§ 100b.260 Allotments are made under program statute.

(a) The Commissioner allots program funds to a State in accordance with the authorizing statute for the program.

(b) Any reallotment to other States will be made by the Commissioner in accordance with the authorizing statute for that program.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.261 Reallotted funds are part of a State's grant.

Funds that a State receives as a result of a reallotment are part of the State's grant for the appropriate fiscal year. However, the Commissioner does not consider a reallotment in determining the maximum or minimum amount to which a State is entitled for a following fiscal year.

(20 U.S.C. 1221e-3(a)(1))

Subpart D—How To Apply to the State for a Subgrant

§ 100b.301 Local educational agency general application.

(a) A local educational agency that applies for subgrants under one or more programs listed in § 100b.1 shall submit to the State a general application that contains the assurances contained in paragraph (c) of this section. That application covers the participation by that local educational agency in all of those programs.

(b) A general application submitted under this section remains in effect for the duration of the programs it covers.

The State agencies or boards administering the programs covered by the application may not require the resubmission or amendment of the application unless required by a change in Federal or State law or by other significant changes in the circumstances affecting an assurance in the application.

(c) The general application submitted by a local educational agency must include assurances—

(1) That the local educational agency will administer each program covered by the application in accordance with all applicable statutes, regulations, program plans, and applications;

(2) That the control of funds provided to the local educational agency under each program and title to property acquired with those funds will be in a public agency and that a public agency will administer those funds and property;

(3) That the local educational agency will use fiscal control and fund accounting procedures that will ensure proper disbursement of, and accounting for, Federal funds paid to that agency under each program;

(4) That the local educational agency will—

(i) Make reports to the State agency or board and to the Commissioner as may reasonably be necessary to enable the State agency or board and the Commissioner to perform their duties;

(ii) Maintain records—including the records required under Section 437 of GEPA—and provide access to those records as the State agency or board or the Commissioner decides are necessary to perform their duties;

(5) That the local educational agency will provide reasonable opportunities for the participation by teachers, parents, and other interested agencies, organizations, and individuals in the planning for and operation of each program;

(6) That any application, evaluation, periodic program plan or report relating to each program will be made readily available to parents and other members of the general public;

(7) That in the case of any project involving construction—

(i) The project is not inconsistent with overall State plans for the construction of school facilities; and

(ii) In developing plans for construction, due consideration will be given to excellence of architecture and design and to compliance with standards prescribed by the Secretary under Section 504 of the Rehabilitation Act of 1973 in order to ensure that facilities constructed with the use of Federal funds are accessible to and usable by handicapped individuals; and

(8) That the local educational agency has adopted effective procedures for—

(i) Acquiring and disseminating to teachers and administrators participating in each program, significant information from educational research, demonstrations, and similar projects; and

(ii) Adopting, if appropriate, promising educational practices developed through those projects.

(20 U.S.C. 1232e)

§ 100b.302 The notice to the subgrantee.

A State shall notify a subgrantee in writing of—

(a) The amount of the subgrant;

(b) The period during which the subgrantee may obligate the funds; and

(c) The Federal requirements that apply to the subgrant.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.303 Joint applications and projects.

(a) Two or more eligible parties may submit a joint application for a subgrant.

(b) If the State must use a formula to distribute subgrant funds (see § 100b.51), the State may not make a subgrant that exceeds the sum of the entitlements of the separate subgrantees.

(c) If the State funds the application, each subgrantee shall—

(1) Carry out the activities that the subgrantee agreed to carry out; and

(2) Use the funds in accordance with Federal requirements.

(d) Each subgrantee shall use an accounting system that permits identification of the costs paid for under its subgrant.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.304 Subgrantee shall make subgrant application available to the public.

A subgrantee shall make any application, evaluation, periodic program plan, or report relating to each program available for public inspection.

(20 U.S.C. 1221e-3(a)(1); 1232e)

§ 100b.305 Amendments to applications.

If a subgrantee makes a significant amendment to its application, the

subgrantee shall use the same procedures as those it must use to submit an application.

(20 U.S.C. 1221e-3(a)(1))

Cross-reference.—See 45 CFR Part 74, Subpart L—Programmatic Changes and Budget Revisions.

Subpart E—How a Subgrant is Made to an Applicant**§ 100b.400 State procedures for reviewing an application.**

A State that receives an application for a subgrant shall take the following steps:

(a) *Review.* The State shall review the application.

(b) *Approval—entitlement programs.* The State shall approve an application if—

(1) The application is submitted by an applicant that is entitled to receive a subgrant under the program; and

(2) The applicant meets the requirements of the Federal statutes and regulations that apply to the program.

(c) *Approval—discretionary programs.* The State may approve an application if—

(1) The application is submitted by an eligible applicant under a program in which the State has the discretion to select subgrantees;

(2) The applicant meets the requirements of the Federal statutes and regulations that apply to the program; and

(3) The State determines that the project should be funded under the authorizing statute and implementing regulations for the program.

(d) *Disapproval—entitlement and discretionary programs.* If an application does not meet the requirements of the Federal statutes and regulations that apply to a program, the State shall not approve the application.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.401 Disapproval of an application—opportunity for a hearing.

(a) *State agency hearing before disapproval.* Under the following programs listed in § 100b.1, the State agency that administers the program shall provide an applicant with notice and an opportunity for a hearing before it may disapprove the application:

(5) State-operated Programs for Handicapped Children.

(6) Assistance to States for Education of Handicapped Children.

(b) *Other programs—hearings not required.* Under the other programs listed in § 100b.1, a State agency—other than a State educational agency—is not required to provide an opportunity for a hearing regarding the agency's disapproval of an application.

(c) If an applicant for a subgrant alleges that any of the following actions of a State educational agency violates a State or Federal statute or regulation, the State educational agency and the applicant shall use the procedures in paragraph (d) of this section:

(i) Disapproval of or failure to approve the application or project in whole or in part.

(ii) Failure to provide funds in amounts in accordance with the requirements of statutes and regulations.

(d) *State educational agency hearing procedures.*

(1) If the applicant applied under a program listed in paragraph (a) of this section, the State educational agency shall provide an opportunity for a hearing before the agency disapproves the application.

(2) If the applicant applied under a program not listed in paragraph (a) of this section, the State educational agency shall provide an opportunity for a hearing either before or after the agency disapproves the application.

(3) The applicant shall request the hearing within 30 days of the action of the State educational agency.

(4)(i) Within 30 days after it receives a request, the State educational agency shall hold a hearing on the record and shall review its action.

(ii) No later than 10 days after the hearing the agency shall issue its written ruling, including findings of fact and reasons for the ruling.

(iii) If the agency determines that its action was contrary to State or Federal statutes or regulations that govern the applicable program, the agency shall rescind its action.

(5) If the State educational agency does not rescind its final action after a review under this paragraph, the applicant may appeal to the Commissioner. The applicant shall file a notice of the appeal with the Commissioner within 20 days after the applicant has been notified by the State educational agency of the results of the agency's review. If supported by substantial evidence, findings of fact of the State educational agency are final.

(6)(i) The Commissioner may also issue interim orders to State educational agencies as he or she may decide are necessary and appropriate pending appeal or review.

(ii) If the Commissioner determines that the action of the State educational agency was contrary to Federal statutes or regulations that govern the applicable program, the Commissioner issues an order that requires the State educational agency to take appropriate action.

(7) Each State educational agency shall make available at reasonable times and places to each applicant all records of the agency pertaining to any review or appeal the applicant is conducting under this section, including records of other applicants.

(8) If a State educational agency does not comply with any provision of this section, or with any order of the Commissioner under this section, the Commissioner immediately terminates all assistance to the State educational agency under the applicable program.

(e) *Other State agency hearing procedures.* State agencies that are required to provide a hearing under paragraph (a) of this section—other than State educational agencies—are not required to use the procedures in paragraph (d) of this section.

(20 U.S.C. 1221e-3(a)(1); 1291b-2)

Subpart F—What Conditions Must Be Met by the State and Its Subgrantees?

Nondiscrimination

§ 100b.500 Federal statutes and regulations on nondiscrimination.

A State and a subgrantee shall comply with the following statutes and regulations:

Subject	Statute	Regulation
Discrimination on the basis of race, color, or national origin.	Title VI of the Civil Rights Act of 1964 (45 U.S.C. 2000d through 2000d-4).	45 CFR Part 80.
Discrimination on the basis of sex.	Title IX of the Education Amendments of 1972 (20 U.S.C. 1681-1683).	45 CFR Part 86.
Discrimination on the basis of handicap.	Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 784).	45 CFR Part 84.
Discrimination on the basis of age.	The Age Discrimination Act (42 U.S.C. 6101 et seq.).	45 CFR Part 90.

(20 U.S.C. 1221e-3(a)(1))

Allowable Costs.

§ 100b.530 General cost principles.

Subpart Q of 45 CFR Part 74 references the general cost principles that apply to grants, subgrants, and cost-type contracts under grants and subgrants.

(20 U.S.C. 1221e-3(a)(1))

Cross-reference.—See 45 CFR Part 74, Subpart G—Matching or Cost Sharing.

§ 100b.532 Use of funds for religion prohibited.

(a) No State or subgrantee may use its grant or subgrant to pay for any of the following:

(1) Religious worship, instruction, or proselytization.

(2) Equipment or supplies to be used for any of the activities specified in paragraph (a)(1) of this section.

(3) Construction, remodeling, repair, operation, or maintenance of any facility or part of a facility to be used for any of the activities specified in paragraph (a)(1) of this section.

(4) An activity of a school or department of divinity.

(b) As used in this section, "school or department of divinity" means an

institution or a component of an institution whose program is specifically for the education of students to—

(1) Prepare them to enter into a religious vocation; or

(2) Prepare them to teach theological subjects.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.533 Acquisition of real property; construction.

No State or subgrantee may use its grant or subgrant for acquisition of real property or for construction unless specifically permitted by the authorizing statute or implementing regulations for the program.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.534 Use of tuition and fees restricted.

No State or subgrantee may count tuition and fees collected from students toward meeting matching, cost sharing, or maintenance of effort requirements of a program.

(20 U.S.C. 1221e-3(a)(1))

Indirect Cost Rates

§ 100b.561 Approval of indirect cost rates.

(a) The Commissioner approves an indirect cost rate for a State agency and for a subgrantee other than a local educational agency. For the purposes of this section, the term "local educational agency" does not include a State agency.

(b) Each State educational agency, on the basis of a plan approved by the Commissioner, shall approve an indirect cost rate for each local educational agency that requests it to do so.

(c) Each indirect cost rate must be approved annually.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.563 Restricted indirect cost rate—programs covered.

A State and a subgrantee shall use a restricted indirect cost rate, computed under 45 CFR 100a.564-100a.568, for each program listed in § 100b.1 that has a statutory requirement not to use Federal funds to supplant non-Federal funds. These programs include the following:

State-operated Programs for Handicapped Children.	Sections 146-147 of the Elementary and Secondary Education Act.
Assistance to States for Education of Handicapped Children.	Part B of the Education of the Handicapped Act.

Coordination

§ 100b.580 Coordination with other activities.

(a) A State and a subgrantee shall, to the extent possible, coordinate each of its projects with other activities that are in the same geographic area served by the project and that serve similar purposes and target groups.

§ 100b.581 Methods of coordination.

Depending on the objectives and requirements of a project, a grantee shall use one or more of the following methods of coordination:

- (a) Planning the project with organizations and individuals who have similar objectives or concerns.
- (b) Sharing information, facilities, staff, services, or other resources.
- (c) Engaging in joint activities such as instruction, needs assessment, evaluation, monitoring, technical assistance, or staff training.
- (d) Using the grant or subgrant funds so as not to duplicate or counteract the effects of funds used under other programs.
- (e) Using the grant or subgrant funds to increase the impact of funds made available under other programs.

(20 U.S.C. 1221e-3(a)(1))

Evaluation**§ 100b.591 Federal evaluation—cooperation by a grantee.**

A State and a subgrantee shall cooperate in any evaluation of a program by the Secretary or the Commissioner.

(20 U.S.C. 1226c; 1231a)

§ 100b.592 Federal evaluation—satisfying requirement for State or subgrantee evaluation.

If a State or a subgrantee cooperates in a Federal evaluation of a program, the Commissioner may determine that the State or subgrantee meets the evaluation requirements of the program.

(20 U.S.C. 1226c; 1231a)

Participation of Students Enrolled in Private Schools**§ 100b.650 Private schools; purpose of §§ 100b.651-100b.662.**

(a) Under some programs, the authorizing statute requires that a State and its subgrantees provide for participation by students enrolled in private schools. Sections 100b.651-100b.662 apply to those programs and provide rules for that participation. These sections do not affect the authority of the State or a subgrantee to enter into a contract with a private party.

(b) If any other rules for participation of students enrolled in private schools apply under a particular program, they are in the authorizing statute or implementing regulations for that program.

(20 U.S.C. 1221e-3(a)(1)).

§ 100b.651 Responsibility of a State and a subgrantee.

(a)(1) A subgrantee shall provide students enrolled in private schools with

a genuine opportunity for equitable participation in accordance with the requirements in §§ 100b.652-100b.662 and in the authorizing statute and implementing regulations for a program.

(2) The subgrantee shall provide that opportunity to participate in a manner that is consistent with the number of eligible private school students and their needs.

(3) The subgrantee shall maintain continuing administrative direction and control over funds and property that benefit students enrolled in private schools.

(b)(1) A State shall ensure that each subgrantee complies with the requirements in §§ 100b.651-100b.662.

(2) If a State carries out a project directly, it shall comply with these requirements as if it were a subgrantee.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.652 Consultation with representatives of private school students.

(a) An applicant for a subgrant shall consult with appropriate representatives of students enrolled in private schools during all phases of the development and design of the project covered by the application, including consideration of—

- (1) Which children will receive benefits under the project;
- (2) How the children's needs will be identified;
- (3) What benefits will be provided;
- (4) How the benefits will be provided; and
- (5) How the project will be evaluated.

(b) A subgrantee shall consult with appropriate representatives of students enrolled in private schools before the subgrantee makes any decision that affects the opportunities of those students to participate in the project.

(c) The applicant or subgrantee shall give the appropriate representatives a genuine opportunity to express their views regarding each matter subject to the consultation requirements in this section.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.653 Needs, number of students, and types of services.

A subgrantee shall determine the following matters on a basis comparable to that used by the subgrantee in providing for participation of public school students:

- (a) The needs of students enrolled in private schools.
- (b) The number of those students who will participate in a project.
- (c) The benefits that the subgrantee will provide under the program to those students.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.654 Benefits for private school students.

(a) *Comparable benefits.* The program

benefits that a subgrantee provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools.

(b) *Same Benefits.* If a subgrantee uses funds under a program for public school students in a particular attendance area, or grade or age level, the subgrantee shall insure equitable opportunities for participation by students enrolled in private schools who—

(1) Have the same needs as the public school students to be served; and

(2) Are in that group, attendance area, or age or grade level.

(c) *Different benefits.* If the needs of students enrolled in private schools are different from the needs of students enrolled in public schools, a subgrantee shall provide program benefits for the private school students that are different from the benefits the subgrantee provides for the public school students.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.655 Level of expenditures for students enrolled in private schools.

(a) Subject to paragraph (b) of this section, a subgrantee shall spend the same average amount of program funds on—

(1) A student enrolled in a private school who receives benefits under the program; and

(2) A student enrolled in a public school who receives benefits under the program.

(b) The subgrantee shall spend a different average amount on program benefits for students enrolled in private schools if the average cost of meeting the needs of those students is different from the average cost of meeting the needs of students enrolled in public schools.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.656 Information in an application for a subgrant.

An applicant for a subgrant shall include the following information in its application:

(a) A description of how the applicant will meet the Federal requirements for participation of students enrolled in private schools.

(b) The number of students enrolled in private schools who have been identified as eligible to benefits under the program.

(c) The number of students enrolled in private schools who will receive benefits under the program.

(d) The basis the applicant used to select the students.

(e) The manner and extent to which the applicant complied with § 100b.652 (consultation).

(f) The places and times that the students will receive benefits under the program.

(g) The differences, if any, between the program benefits the applicant will provide to public and private school students, and the reasons for the differences.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.657 Separate classes prohibited.

A subgrantee may not use program funds for classes that are organized separately on the basis of school enrollment or religion of the students if—

(a) The classes are at the same site; and

(b) The classes include students enrolled in public schools and students enrolled in private schools.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.658 Funds not to benefit a private school.

(a) A subgrantee may not use program funds to finance the existing level of instruction in a private school or to otherwise benefit the private school.

(b) The subgrantee shall use program funds to meet the specific needs of students enrolled in private schools, rather than—

(1) The needs of a private school; or

(2) The general needs of the students enrolled in a private school.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.659 Use of public school personnel.

A subgrantee may use program funds to make public personnel available in other than public facilities—

(a) To the extent necessary to provide equitable program benefits designed for students enrolled in a private school; and

(b) If those benefits are not normally provided by the private school.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.660 Use of private school personnel.

A subgrantee may use program funds to pay for the services of an employee of a private school if—

(a) The employee performs the services outside of his or her regular hours of duty; and

(b) The employee performs the services under public supervision and control.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.661 Equipment and supplies.

(a) Under some program statutes, a public agency must keep title to and exercise continuing administrative control of all equipment and supplies that the subgrantee acquires with program funds. This public agency is usually, the subgrantee.

(b) The subgrantee may place equipment and supplies in a private school for the period of time needed for the project.

(c) The subgrantee shall insure that the equipment or supplies placed in a private school—

(1) Are used only for the purposes of the project; and

(2) Can be removed from the private school without remodeling the private school facilities.

(d) The subgrantee shall remove equipment or supplies from a private school if—

(1) The equipment or supplies are no longer needed for the purposes of the project; or

(2) Removal is necessary to avoid use of the equipment of supplies for other than project purposes.

(20 U.S.C. 1221e-3(a)(1))

General Administrative Responsibilities

§ 100b.700 Compliance with statutes, regulations, State plan, and applications.

A State and a subgrantee shall comply with the State plan and applicable statutes, regulations, and approved applications, and shall use Federal funds in accordance with those statutes, regulations, plan, and applications.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.701 The State or subgrantee administers or supervises each project.

A State or a subgrantee shall directly administer or supervise the administration of each project.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.702 Fiscal control and fund accounting procedures.

A State and a subgrantee shall use fiscal control and fund accounting procedures that insure proper disbursement of and accounting for Federal funds.

(20 U.S.C. 1221e-3(a)(1))

Cross-reference.—See 45 CFR Part 74, Subpart B—Cash Depositories, Subpart H—Standards for Grantees and Subgrantees and Subgrantees Financial Management Systems, and Subpart K—Grant and Subgrant Payment Requirements.

§ 100b.703 When a State may begin to obligate funds.

(a) A State may not begin to obligate funds under a program until the later of the following two dates:

(1) The date that the State plan is mailed or hand delivered to the Commissioner in a substantially approvable form.

(2) The date that the funds are first available for obligation by the Commissioner.

(b)(1) The State must show one of the following as proof of mailing:

(i) A legibly dated U.S. Postal Service postmark.

(ii) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(iii) A dated shipping label, invoice, or receipt from a commercial carrier.

(iv) Any other proof of mailing acceptable to the Commissioner.

(2) If a State plan is mailed through the U.S. Postal Service, the Commissioner does not accept either of the following as proof of mailing:

(i) A private metered postmark.

(ii) A mail receipt that is not dated by the U.S. Postal Service.

Notes.—The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, a State should check with its local post office.

(c) After determining that a State plan is in substantially approvable form, the Commissioner informs the State of the date on which it could begin to obligate funds. Reimbursement for those obligations is subject to final approval of the State plan.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.704 When certain subgrantees may begin to obligate funds.

(a) If the authorizing statute for a program requires a State to make subgrants on the basis of a formula (see § 100b.5), the State may not authorize an applicant for a subgrant to obligate funds until the later of the following two dates:

(1) The date that the State may begin to obligate funds under § 100b.703; or

(2) The date that the applicant submits its application to the State in substantially approvable form.

(b) Reimbursement for obligations under paragraph (a) of this section is subject to final approval of the application.

(c) If the authorizing statute for a program gives the State discretion to select subgrantees, the State may not authorize an applicant for a subgrant to obligate funds until the subgrant is made. However, the State may approve pre-agreement costs in accordance with the cost principles that are appended to 45 CFR Part 74 (Appendices C-F).

(20 U.S.C. 1221e-3(a)(1))

§ 100b.705 Funds may be obligated during a "carryover period."

(a) If a State or a subgrantee does not obligate all of its grant or subgrant funds by the end of the fiscal year for which Congress appropriated the funds, it may obligate the remaining funds during a carryover period of one additional fiscal year.

(b) The State shall return to the Federal Government any carryover funds not obligated by the end of the carryover period by the State and its subgrantees.

(U.S.C. 1225(b))

§ 100b.706 Obligations made during a carryover period are subject to current statutes, regulations, and applications.

A State and a subgrantee shall use carryover funds in accordance with—

(a) The Federal statutes and regulations that apply to the program and are in effect for the carryover period; and

(b) Any State plan, or application for a subgrant, that the State or subgrantee is required to submit for the carryover period.

§ 100b.707 When obligations are made.

The following table shows when a State or a subgrantee makes obligations for various kinds of property and services.

<i>If the obligation is for—</i>	<i>The obligation is made—</i>
(a) Acquisition of real or personal property.	On the date on which the State or subgrantee makes a binding written commitment to acquire the property.
(b) Personal services by an employee of the State or subgrantee.	When the services are performed.
(c) Personal services by a contractor who is not an employee of the State or subgrantee.	On the date on which the State or subgrantee makes a binding written commitment to obtain the services.
(d) Performance of work other than personal services.	On the date on which the State or subgrantee makes a binding written commitment to obtain the work.
(e) Public utility services.	When the State or subgrantee receives the services.
(f) Travel.	When the travel is taken.
(g) Rental of real or personal property.	When the State or subgrantee uses the property.
(h) A pre-agreement cost that was properly approved by the State under the cost principles in appendices C-F to 45 CFR Part 74.	On the first day of the subgrant period.

(20 U.S.C. 1221e-3(a)(1))

Reports

Cross-reference.—See 45 CFR Part 74, Subpart I—Financial Reporting Requirements, and Subpart J—Monitoring and Reporting of Program Performance.

§ 100b.720 Financial and performance reports by a State.

(a) This section applies to a State's reports required under 45 CFR Part 74, Subparts I (financial reporting) and J (performance reporting).

(b) A state shall submit these reports annually, unless the Commissioner allows less frequent reporting.

(c) However, the Commissioner may, under 45 CFR 74.7 (Special grant or subgrant conditions) or 45 CFR 74.72(e) (Grantee accounting systems), require a State to report more frequently than annually.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.722 A subgrantee makes reports required by the State.

A State may require a subgrantee to furnish reports that the State needs to carry out its responsibilities under the program.

(20 U.S.C. 1221e-3(a)(1))

Records

Cross-reference.—See 45 CFR Part 74, Subpart D—Retention and Access Requirements for Records.

§ 100b.730 Records related to grant funds.

A State and a subgrantee shall keep records that fully show—

- (a) The amount of funds under the grant or subgrant;
- (b) How the State or subgrantee uses the funds;
- (c) The total cost of the project;
- (d) The share of that cost provided from other sources; and
- (e) Other records to facilitate an effective audit.

(20 U.S.C. 1232f)

§ 100b.731 Records related to compliance.

A State and a subgrantee shall keep records to show its compliance with program requirements.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.734 Record retention period.

Unless a longer period is required under 45 CFR Part 74, a State and a subgrantee shall retain records for five years after completion of the activity for which they use grant or subgrant funds.

(20 U.S.C. 1232f(a))

Cross-reference.—See 45 CFR 74.21 Length of retention period; and 74.22 Starting date of retention period.

Privacy

§ 100b.740 Protection of and accessibility to student records.

Most records on present or past students are subject to the requirements of Section 438 of GEPA and its implementing regulations under 45 CFR Part 99. (Section 438 is the Family Educational Rights and Privacy Act of 1974.)

(20 U.S.C. 1231g)

§ 100b.741 Protection of students' privacy in research and testing.

(a) If a project funded by the Office of Education is designed to explore or develop new or unproven teaching methods or techniques, the grantee must give parents or guardians of children who participate in the project access to instructional material that will be used in connection with the project, including teachers' manuals, films, tapes, or other supplementary instructional material.

(b) No student may be required, as part of any program of the Office of Education, to submit to psychiatric examination, testing, or treatment, or psychological examination, testing, or

treatment, in which the primary purpose is to reveal information concerning—

- (1) Political affiliations;
- (2) Mental and psychological problems potentially embarrassing to the student or his family;
- (3) Sex behavior and attitudes;
- (4) Illegal, anti-social, self-incriminating and demeaning behavior;
- (5) Critical appraisals of other individuals with whom respondents have close family relationships;
- (6) Legally recognized privileged and analogous relationships, such as those of lawyers, physicians, and ministers; or
- (7) Income—other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under the program—without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of unemancipated minor, without the prior written consent of the parent.

(20 U.S.C. 1232h)

§ 100b.772 Other responsibilities of the State.

- (a) A State shall—
- (1) Provide technical assistance to prospective applicants and grantees;
- (2) Assist in the evaluation of projects;
- (3) Develop and use procedures to monitor each project; and
- (4) Develop procedures, issue rules, or take whatever action may be necessary to properly administer each program and to avoid illegal, imprudent, wasteful, or extravagant use of funds by the State or a subgrantee.

Complaint Procedures of the State

§ 100b.780 A State shall adopt complaint procedures.

(a) A State shall adopt written procedures for—

- (1) Receiving and resolving any complaint that the State or a subgrantee is violating a Federal statute or regulations that apply to a program;
- (2) Reviewing an appeal from a decision of a subgrantee with respect to a complaint; and
- (3) Conducting an independent on-site investigation of a complaint if the State determines that an on-site investigation is necessary.

(b) Sections 100b.780–100b.782 apply to the program under Title IV of the Elementary and Secondary Education Act unless administrative funds for that program are appropriated under Title V-A of that Act.

(c) Sections 100b.780–100b.782 do not apply to the program under Title I of the Elementary and Secondary Education Act.

Cross-reference.—See § 100b.1 Program to which Part 100b applies.

(20 U.S.C. 1221e-3(a)(1))

§ 100b.781 Minimum complaint procedures.

A State shall include the following in its complaint procedures:

- (a) A time limit of 60 calendar days after the State receives a complaint—
(1) If necessary, to carry out an independent on-site investigation; and
(2) To resolve the complaint.

(b) An extension of the time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint.

(c) The right to request the Commissioner to review the final decision of the State.

(20 U.S.C. 1221e-3(s)(1))

§ 100b.782 An organization or individual may file a complaint.

An organization or individual may file a written signed complaint with a State. The complaint must include—

(a) A statement that the State or a subgrantee has violated a requirement of a Federal statute or regulations that apply to a program; and

(b) The facts on which the statement is based.

(20 U.S.C. 1221e-3(s)(1))

§ 100b.783 State educational agency action—subgrantee's opportunity for a hearing.

(a) A subgrantee may request a hearing if it alleges that any of the following actions by the State educational agency violated a State or Federal statute or regulation:

- (1) Ordering, in accordance with a final State audit resolution determination, the repayment of misspent or misapplied Federal funds; or
(2) Terminating further assistance for an approved project.

(b) The procedures in § 100b.401(c)(2)-(7) apply to any request for a hearing under this section.

(20 U.S.C. 1231b-2)

Subpart H—What Procedures Does the Commissioner Use to Get Compliance?

Cross-reference.—See 45 CFR Part 74, Subpart M—Grant and Subgrant Closeout, Suspension, and Termination.

§ 100b.900 Waiver of regulations prohibited.

(a) No official, agent, or employee of HEW may waive any regulation that applies to an Office of Education program unless the regulation specifically provide that it may be waived.

(b) No act or failure to act by an official, agent, or employee of HEW can affect the authority of the Commissioner to enforce regulations.

(43 Dec. Comp. Gen. 31(1963))

§ 100b.901 Education Appeal Board.

(a) The Education Appeal Board, established under Part E of GEPA, has the following functions:

- (1) Audit appeal hearings under Section 452 of GEPA.
(2) Withholding and termination hearings under Section 453 of GEPA.
(3) Cease and desist hearings under Section 453 of GEPA.
(4) Any other proceeding designated by the Commissioner.

(b) The regulations for the Education Appeal Board are in 45 CFR Part 100d. (20 U.S.C. 1234)

§ 100b.902 Judicial review.

After a hearing by the Commissioner, a State is usually entitled—generally by the statute that required the hearing—to judicial review of the Commissioner's decision.

(20 U.S.C. 1221e-3(s)(1))

PART 100c—GENERAL**Sec.**

100c.1 Definitions that apply to all Education Division Programs.

100c.2 Records under the Freedom of Information Act.

Authority: Section 408(s)(1) of Pub. L. 90-247, 88 Stat. 559, 560, as amended (20 U.S.C. 1221e-3(a)(1)), unless otherwise noted.

PART 121a—ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

§§ 121a.15, 121a.112, 121a.113, 121a.114, 121a.120, 121a.135, 121a.142, 121a.143, 121a.150, 121a.181, 121a.191, 121a.228, 121a.232, 121a.233, 121a.234, 121a.236, 121a.239, 121a.386, 121a.453, 121a.454, 121a.455, 121a.456, 121a.457, 121a.458, 121a.459, 121a.460, 121a.581, 121a.582, 121a.583, 121a.590, 121a.591, 121a.592, 121a.593, 121a.601, 121a.602 [Revoked]

§§ 121a.8, 121a.183, 121a.190, 121a.193, 121a.452 [Amended]

20. The following sections are revoked: §§ 121a.8(a); 121a.15; 121a.112; 121a.113; 121a.114; 121a.120; 121a.135; 121a.142; 121a.143; 121a.150; 121a.181; 121a.183(b); 121a.190(a); 121a.191; 121a.193(a) and (b); 121a.228; 121a.232; 121a.233; 121a.234; 121a.236; 121a.239; 121a.386; 121a.452(b); 121a.453; 121a.454; 121a.455; 121a.456; 121a.457; 121a.458; 121a.459; 121a.460; 121a.581; 121a.582; 121a.583; 121a.590; 121a.591; 121a.592; 121a.593; 121a.601; and 121a.602.

21. Section 121a.3 is revised to read as follows:

§ 121a.3 Regulations that apply to Assistance to States for Education of Handicapped Children.

(a) *Regulations.* The following regulations apply to this program of Assistance to States for Education of

Handicapped Children.

(1) The Education Division General Administrative Regulations (EDGAR) in 45 CFR Part 100b (State-Administered Programs) and Part 100c (Definitions).

(2) The regulations in this Part 121a.

(b) *How to use regulations; how to apply for funds.* The "Introduction to Regulations of the Education Division" at the beginning of EDGAR includes general information to assist in—

- (1) Using regulations that apply to Education Division programs; and
(2) Applying for assistance under an Education Division program.

(20 U.S.C. 1221e-3(s)(1))

Definitions

22. Section 121a.450 is revised to read as follows:

§ 121a.450 Definition of "private school handicapped children."

As used in §§ 121a.451-121a.452, "private school handicapped children" means handicapped children enrolled in private schools or facilities other than handicapped children covered under §§ 121a.400-121a.403.

(20 U.S.C. 1413(s)(4)(A))

23. Section 121a.451 is revised to read as follows:

§ 121a.451 State educational agency responsibility.

The State educational agency shall insure that—

(a) To the extent consistent with their number and location in the State, provision is made for the participation of private school handicapped children in the program assisted or carried out under this part by providing them with special education and related services; and

(b) The requirements in 45 CFR 100b.651-100b.663 of EDGAR are met.

(20 U.S.C. 1413(s)(4)(A))

PART 100b—STATE-ADMINISTERED PROGRAMS**Subpart B—How a State Applies for a Grant****State Plans and Applications****§ 100b.101 The general State application.**

Comment. One commenter asked why this section was limited to local educational agencies (LEAs) and why no mention was made of public junior or community colleges.

Response. No change has been made. This section implements Section 435 of the General Education Provisions Act, which applies only to programs under which SEAs make subgrants to LEAs. Since public junior or community

colleges do not provide elementary or secondary education, they are not covered under the usual statutory definition of LEA. The State Vocational Education Program, which does include them (see the definition of "local educational agency" in Part 100c), is not subject to the State general application requirement. The program has its own general application required by the program statute.

Comment. One commenter suggested that the assurance that "each program will be administered in accordance with all applicable statutes, regulations, program plans, and applications" includes civil rights and other similar statutes and regulations. Therefore, these documents should not have to be submitted with every plan or application.

Response. No change has been made. Civil rights assurances are required by the civil rights regulations referenced in § 100b.500. Amendments to those regulations are outside the scope of EDGAR.

Comment. One commenter suggested that procedures be established, including formal notification in writing, to inform members of traditionally underrepresented groups regarding consultation in the planning process.

Response. No change has been made. Because program statutes vary widely regarding participation of various groups in the planning process, it is not feasible to have a general rule that would apply to all of the programs listed in § 100b.1.

Changes. This section has been amended to incorporate statutory provisions that were referenced in the proposed regulations.

§ 100b.103 Three-year State plan

Comment. One commenter suggested that because paragraph (b) permits the Commissioner to establish a staggered schedule for the submission of three-year State plans, the Commissioner should not ask for the submission of a State plan more often than once every three years.

Response. No change has been made. The establishment of three-year State plans is at the discretion of the Commissioner. The establishment of a staggered schedule would, in the first years, involve the submission of State plans by some States at less than a three-year interval. If there is no objection to the staggered schedule, the Commissioner must be able to take the necessary steps to begin it.

Comment. Several commenters suggested that three-year State plans should not be permitted or, alternatively, that the regulations should require annual amendment of three-year State plans.

Response. No change has been made. The Commissioner believes that making each State plan effective for three years in desirable to reduce paperwork and to improve the quality of each State plan. To require annual updating would largely defeat the advantages of three-year State plans. The Commissioner does, however, retain the right to require an amendment if he or she determines that one is essential. Further, this determination may be made on a case-by-case basis or in individual program regulations.

Cross-reference.—See § 100b.140 Amendments to a State plan.

Also, this section does not prevent the Commissioner from obtaining necessary information through reports from the States, rather than in the State plans. Amendments to State plans should be submitted as necessary, not on a predetermined schedule that ignores the need for amendment.

§ 100b.104 A State shall include certain certifications in its State plan.

Comment. One commenter suggested that the certifications required by this section be submitted as a part of the State's general application under § 100b.101.

Response. No change has been made. These are two different kinds of statements. The general application includes statutory assurances that remain in effect from year to year but does not contain the specific programmatic information in the State plans that makes the certification necessary.

Comment. One commenter suggested that paragraphs (3), (4), and (5) are redundant and should be dropped.

Response. No change has been made. These paragraphs are necessary to assure the Commissioner that State law will not conflict with implementation of the State plan.

Comment. One commenter suggested that each State should hold a public hearing on each State plan, particularly now that State plans may cover three years.

Response. No change has been made. Under Section 435 of GEPA, public hearings on State plans are required only for programs administered by State educational agencies, under which subgrants are made to LEAs, (see § 100b.101), or programs that have specific requirements for public hearings in the authorizing statutes (such as the State Vocational Education Program (see 45 CFR Part 104)). To extend this requirement to other State-administered programs would put a burden on States and might go beyond the Education Division's legislative authority.

Cross-reference.—See § 100b.101 The general State application.

§ 100b.105 The Governor has 45 days to comment on the State Plan.

Comment. Two commenters suggested that a State be allowed to submit its State plan to the Commissioner at the same time it submits it to the Governor under OMB Circular A-

Response. No change has been made. Circular A-95 provides for the Governor's comments or a statement that no comments were received to be submitted with the State plan. A State may send an advance copy of its State plan to the Commissioner to review in draft form. However, the Commissioner cannot approve the State plan until the requirements of this section have been met.

Comment. One commenter objected to the apparent requirement that the 45-day comment period for the Governor and the 60-day publication period required by Section 435(b)(7) (B) of the General Education Provisions Act (now in § 100b.101(e)(7)(ii)) must run consecutively, which would substantially delay submission of State plans.

Response. No change has been made. The Commissioner interprets the statute and the circular as permitting the two periods to run concurrently.

§ 100b.106 State plan is public information.

Comment. One commenter suggested that it should be possible to exclude personally identifiable data from the materials that a State must make available for public inspection.

Response. A change has been made. Paragraph (a)(4) of the proposed rules

has been deleted. That paragraph would have required the State to make available to the public "all documents that a State uses to administer or operate a program." The remaining documents subject to this section, such as State plans, do not contain personally identifiable information that if released would violate an individual's privacy. States would still be expected to make available at least some of the documents that would have been covered under proposed paragraph (a)(4), but may delete confidential information if appropriate.

Comment. One commenter suggested that "available for public inspection" should be interpreted to mean that a member of the public may look at or review documents under the supervision of State personnel or may purchase copies at a reasonable cost.

Response. No change has been made. Each State may establish reasonable rules and procedures for public access. Detailed requirements established by the Commissioner should not be necessary.

Comment. One commenter suggested that correspondence should not be considered public information. The commenter also asked whether "all documents" includes forms.

Response. A change has been made. As noted in the response above, paragraph (a)(4) of the proposed section has been deleted. In general, if a State uses a form in a Federal program, it should make that form available on request. States are also expected to make non-confidential correspondence available, but this section would not require release unless the correspondence was related to the State plan (see § 100a.106(a)).

Comment. One commenter suggested procedures permitting interested parties to notify the State of their interest in inspecting identified State plans. The State would then inform the interested parties. In writing, of the time and place a State plan could be inspected. Further, copies of a State plan would have to be sent by the State to those parties requesting it.

Response. No change has been made. A State may establish reasonable procedures of its own, but the Commissioner believes that detailed Federal procedures to apply to all States are unnecessary and would be overly burdensome.

Other changes. Approved subgrant applications have been added to the list of materials that must be made available for public inspection.

Amendments

§ 100b.140 Amendments to a State plan.

Comment. One commenter objected to giving the Commissioner the authority to require an amendment to a State plan. The commenter said that if the Commissioner approves a State plan, that approval should last through the life of the plan.

Response. No change has been made. The regulations indicate that the Commissioner may require an amendment if it is determined to be essential. This is a statutory requirement from Section 430(a) of GEPA. An example of a situation which would make an amendment essential is a change in the program statute or a change in State law or procedures that has a significant effect on the State's administration of the plan. The Commissioner and the State cannot properly administer a program under procedures that have been changed by a new statute or under other circumstances that would make an amendment to the plan essential.

Comment. A commenter suggested that a State should not have to amend its State plan if a change in

administration or operation is still clearly in compliance with the law and the regulations. A description of that type of changes could be made in an appendix to an annual report.

Response. No change has been made. An amendment is required only if a change is significant and relevant. If the change in administration or operation alters the nature of the program or program activities so that the program is no longer what was originally approved by the Commissioner, the State needs the Commissioner's explicit approval to operate under the new policy or procedure. An amendment is the procedure to obtain that approval.

§ 100b.141 An amendment requires the same procedures as the document being amended.

Comment. Several commenters suggested that an amendment should not have to go through the same procedures as the original document. They suggested that many amendments are merely technical in nature and that the broad considerations treated in the clearance process are not necessary for amendments. One commenter suggested that a public hearing not be required if the amendment is minor.

Response. No change has been made. If an amendment to a State plan is required under § 100b.140, it is appropriate for the amendment to be subject to review by the same organizational units, officials, or groups that were required to review the original plan or other document before it was submitted to the Education Division. The same would be true for other formal documents the State must submit under a program. Under the provisions of § 100b.140, minor or technical changes that are not significant may not require formal amendment of the State plan or other document.

Subpart C—How a Grant is Made to a State

Approval or Disapproval by the State

§ 100b.202 Opportunity for a hearing before a State plan is disapproved.

Comment. One commenter suggested that a State should be entitled to a hearing within 60 days after disapproval of its State plan is received and that the issue should be resolved within an additional 60 days.

Response. No change has been made. Disapproval of a State plan is a drastic step that would only be used as a last resort. Since the Commissioner does not expect to have to disapprove any State plans, procedures for disapproval would be developed, if necessary, for each case. The Commissioner would, of course, provide the State with an expeditious hearing and final decision if disapproval were to become necessary.

§ 100b.235 The notification of grant award.

Comment. One commenter suggested that the Commissioner notify all States of the approval of a grant application by March 1 preceding the fiscal year in which the grant award is to be made.

Response. No change has been made. Early approval is very desirable, but it would depend on the enactment of appropriation acts, the State's early submission of plans, and other factors not under control of the Commissioner. However, the Office of Education continually works with the States to get earlier approval of State plans every year. Also, the implementation of the three-year State plan may make it possible to accomplish the commenter's purpose, at least in the second and third years of those plans, since there will not be a new approval process to go through.

Changes. Proposed § 100b.203 has been renumbered as § 100b.235.

Allotments and Reallotments of Grant Funds

§ 100b.260 Allotments are made under program statute.

Comment. One commenter suggested that the regulations describe the manner in which a State's need will be determined for reallotment purposes. Another commenter suggested that the State be given an opportunity to expend funds before the Commissioner withdraws them, and one asked if State administrative funds might be withdrawn, as well as local program funds.

Response. A change has been made. Proposed § 100b.230 has been renumbered as § 100b.260 and revised to provide that any reallotment of funds by the Commissioner is made in accordance with the authorizing statute. Proposed §§ 100b.231, 100b.232, 100b.233, and 100b.235 have been deleted. Proposed § 100b.234 has been renumbered as § 100b.261 and provides that reallotted funds are part of the grant of the State that receives the reallotted funds.

The proposed regulations being eliminated include those relative to establishing a State's need for reallotted funds. Because reallotment is a rare occurrence, detailed regulations in EDGAR are not necessary.

If the State has no need for administrative funds, and if it is not authorized or is unable to use them as program funds, the Commissioner may reallocate them.

§ 100b.301 Local educational agency general application.

Comment. One commenter suggested that the term "general application" is confusing and that the term "statement of assurances" should be used instead.

Response. No change has been made. The term "general application" is the term used in the statute; i.e., Section 436 of GEPA. It is probably less confusing to use terminology that is consistent with the Act.

Changes. This section has been amended by incorporating the statutory material referenced in the proposed rules.

§ 100b.302 The notice to the subgrantee.

Comment. One commenter asked if the State must send the subgrantee a copy of the applicable statute and regulations along with the subgrant award document.

Response. No change has been made. A State is not required to provide the subgrantee a copy of the applicable statute and regulations but is encouraged to do so. The State would be expected to provide a copy on request. Distribution of pertinent program requirements is a general administrative duty of the State.

Cross-reference.—See §§ 100b.770–100b.772—Administrative duties of the State.

§ 100b.303 Joint applications and projects.

Comment. Several commenters suggested that it is inefficient and wasteful for a number of subgrantees to combine their subgrants in order to conduct a joint project if they must maintain a separate accounts for the funds each contributes. The commenters suggested that it would be more efficient for one subgrantee to serve as fiscal agent for all the subgrantees and then treat the combined subgrants as a single account.

Response. A change has been made. This section provides a method for both applying for and administering a joint project with one account. The method requires submission of a single joint application if several applicants apply for one combined subgrant.

Under a program in which subgrant amounts are entitlements of the individual subgrantees and must be used for particular purposes, it is necessary for each subgrantee to remain separately accountable for the use of the funds it receives. This would not prevent a State agency—under a program that gives the agency discretion to select subgrantees—from allowing eligible applicants to apply as a consortium under procedures like those described in §§ 100a.127–100a.129. In such a case, there would only be one subgrantee that would be accountable for all subgrant funds. The other participants would be legally responsible for the funds they receive to carry out their assigned parts of the project.

§ 100b.304 Subgrantee shall make subgrant application available to the public.

Comment. One commenter suggested that this section of EDGAR take precedence over 45 CFR 121a.234 and 45 CFR 121a.280 of the regulations for the Federal education of handicapped children program, which the commenter considered more restrictive.

Response. A change has been made. Section 100b.304 has been revised to require that a subgrantee shall make available to the public any application, evaluation, periodic program plan, or report relating to a program. Although Section 436 applies only to local educational agencies, the policy it expresses is extended to all subgrantees by these regulations. 45 CFR 121a.234 of the handicapped program regulations has been revoked by the revisions published with this document. The regulations in 45 CFR 121a.280 relate to public hearings by State educational agencies on State plans. This section of EDGAR does not deal with that matter.

§ 100b.305 Amendments to applications.

Comment. One commenter suggested that the words "unless the SEA deems otherwise" be added.

Response. A change has been made. This section has been revised to require that only significant amendments to subgrantee applications require the same procedures as the application itself. The purpose of the change is to avoid for minor changes the necessity for formal amendment of the application. Procedures regarding minor changes are left to the discretion of the State.

Subpart E—How a Subgrant is Made to an Applicant

§ 100b.400 State procedures for reviewing an application

Comment. One commenter suggested that the requirement in paragraph (b) that a State must approve an application does not take into account a situation in a discretionary program in which there are insufficient funds. Another commenter suggested that the requirement does not provide for situations in which a State is either prohibited from or required to establish funding priorities.

Response. A change has been made. Titles have been added to make it clear that paragraph (b) refers only to formula subgrant programs. Under these programs, any State priorities will be governed by the State's authority under the applicable Federal statutes and regulations.

Comment. Two commenters objected to the requirement in paragraph (b) that a State must fund an application if, among other things, the applicant complies with Federal statutes and regulations. The commenter said that the requirement does not recognize a State's interests in adopting State rules

that may be more stringent than Federal regulations.

Response. No change has been made. A State may adopt reasonable rules and procedures that are not inconsistent with Federal statutes and regulations. However, paragraph (b) applies to programs in which local agencies are entitled to receive Federal funds. Under these programs, a State must provide the funds if the agency qualifies under the Federal statutes and regulations. The addition of paragraph titles clarifies this distinction.

Other changes. Paragraph (c)(1) has been revised to make it clear that only eligible applicants may receive a subgrant. Eligibility is determined under the program statute and implementing regulations. Paragraph (d) has been rewritten to make its intent clearer.

§ 100b.401 Disapproval of an application—opportunity for a hearing.

Comment. One commenter suggested that there does not appear to be any explanation of why the particular programs are identified in proposed paragraph (b). One commenter wanted clarification of the specific programs that are listed.

Response. No change has been made. The programs listed are those for which the authorizing statutes require an opportunity for a hearing before the State can disapprove an application. Proposed paragraph (b) has been redesignated as paragraph (a), the list has been corrected, and the programs put in the same order as they appear in the table in § 100b.1. Proposed paragraph (a) has been revised and renumbered as paragraph (c), the content of which is discussed below.

Comment. One commenter suggested that under paragraph (a) (as redesignated) all applicants for funds under the listed programs should not have a right to a hearing before decisions are made regarding approval or disapproval. The commenter suggested that the hearing referred to in paragraph (a) be available only after disapproval.

Response. No change has been made. The authorizing statutes for the programs listed require a State to provide for a hearing before disapproval of an application.

Changes. Proposed paragraph (c) has been redesignated as paragraph (b) and revised to clarify the responsibilities of State agencies other than SEAs. Revised paragraphs (c) and (d) specify the conditions and procedures under which an SEA is required to provide an applicant with an opportunity for a hearing if the SEA does not approve an application. The new paragraphs implement procedures required under Section 425 of GEPA. A new paragraph (e) recognizes that State agencies other than SEAs are not bound by the

procedures in Section 425 of GEPA, even if they must provide a hearing under a program listed in paragraph (a).

Allowable Costs

§ 100b.530 General cost principles.

Comment. One commenter noted that this section contains a cross-reference to Subpart Q of 45 CFR Part 74 which, in turn, contains a cross-reference to the cost principles in the appendices to 45 CFR Part 74. Appendix C gives the granting agency authority to approve costs of its grantees that are State or local governments. The commenter suggested that a State that is a grantee of a Federal agency may be, in turn, a granting agency itself when it makes a subgrant to a subgrantee. The commenter suggested that the State ought to have authority to approve costs of its subgrantees.

Response. No change has been made. The Commissioner interprets the cost principles in the manner suggested by the commenter. See the discussion under § 100b.707 in this appendix.

§§ 100b.532-100b.533 Particular cost items.

Evaluation

§ 100b.591 Federal evaluation—cooperation by a grantee.

Comment. Three commenters suggested that "any evaluation" is too broad an interpretation of the legislative intent covered in the statutory authority for this section.

Response. No change has been made. Grantee cooperation is required only with evaluations that are authorized by statute. (See the discussion under § 100a.591 in this appendix)

Participation of Students Enrolled in Private Schools

§§ 100b.650-100b.662

Comment. One commenter asked for a list of the programs to which

§§ 100b.650-100b.662 and § 100a.650 apply.

Response. No change has been made. If the authorizing statute for a program requires that students enrolled in private schools be given an opportunity to participate, the program regulations will specify the requirement.

Comment. One commenter suggested that, for some programs, the documentation required is excessive and has never been required before.

Response. No change has been made. If any documentation under EDGAR is not required for a specific program, appropriate language in the regulations for that program will eliminate the requirement, in accordance with the provisions of § 100b.2.

Comment. One commenter complained that the regulations require LEAs to provide services to private schools at LEA cost.

Response. No change has been made. In practically every instance the costs of administering a Federal program are provided as part of the grant or subgrant of Federal funds. In any case, EDGAR does not require that non-Federal funds be used to pay the costs of providing services to private school children.

Comment. Two commenters suggested that a definition of "genuine" is needed, and one commenter said LEAs should not be required to submit for private school children requests for services that are different from services requested for public school children.

Response. No change has been made. The services to be provided vary widely, depending on local circumstances, making it impractical to try to define "genuine" or "genuine opportunity" in detail by regulation.

Under § 100b.654, if the needs of private school children are different from the needs of public school children, it is expected that generally an application will have to contain two different components—one to meet the needs of the public school children and the other to meet the needs of the private school children. If the needs of the two groups differ, the statutes governing participation by private school children generally require that different services be designed to meet those different needs. If this is not true under a particular statute, the program regulations will specify an exception.

§ 100b.650 Private schools: purpose of §§ 100b.651-100b.662.

Comment. One commenter suggested that paragraph (a) be reworded to read "... the authorizing statute requires the participation of children enrolled in private schools."

Response. No change has been made. The pertinent statutes require that opportunity for participation of private school children be provided but regulations cannot compel that participation, as the suggested wording could be understood to do. The language of the section has been changed to more clearly specify the requirement, but the substance of the regulations remains the same.

§ 100b.651 Responsibility of a State and a subgrantee.

Comment. One commenter suggested that paragraph (a) read: "... its subgrantees provide for the equitable participation of students enrolled in private schools..." Another commenter suggested that the word "provide" be used rather than "give."

Response. The changes have been made. The section has been revised to

require that a State and its subgrantees provide students enrolled in private schools with a genuine opportunity for equitable participation. The intent of the change is to emphasize that the regulations require fairness in determining program services for students enrolled in private schools.

Comment. One commenter suggested that other words be substituted for the word "benefits" in proposed § 100b.652.

Response. A change has been made. The word has been replaced by the phrase "funds and property that benefit" and proposed § 100b.652 has been incorporated into § 100b.651. In other sections the term "benefits" is used as a generic description of the services that are provided under the various programs to which §§ 100b.650-100b.662 apply. These services vary, depending on the nature of the program.

Other changes. 1. As a result of proposed § 100b.652 being incorporated into § 100b.651, proposed §§ 100b.653-100b.663 have been renumbered as §§ 100b.652-100b.662.

2. Section 100b.651 has been revised to clarify the responsibility of the State agencies that administer these programs.

§ 100b.652 Consultation with representatives of private school students.

Comment. One commenter suggested that consultation should be required only with representatives who have indicated interest in a proposal.

Response. No change has been made. One purpose of consultation is to inform the representatives of the opportunities available under a program. Without consultation, the representatives might not know enough about the program to indicate any interest.

Comment. One commenter suggested that the requirements for prior consultation be dropped entirely as being an unreasonable burden.

Response. No change has been made. Consultation prior to decision is necessary for effective participation, which is required under these program statutes.

Comment. One commenter suggested deletion of proposed paragraph (d)(1), which would have required consultation about an applicant's decision to participate. The commenter said that a decision not to participate in a program should be made solely by the public agency.

Response. A change has been made. As revised, § 100b.652 provides that appropriate representatives of private school students are to be consulted during all phases of the development and design of the project. The list of examples does not include decisions to participate or not to participate since it would be too difficult to determine when those "decisions" are made. The

emphasis should be on early and comprehensive consultation, so that the appropriate representatives have a fair opportunity for involvement in the development and design of the project.

Comment: One commenter suggested that a subgrantee should not have to worry about consulting with private school representatives who do not respond after a specified number of unsuccessful attempts to communicate with them. Another commenter was concerned that the regulations would require consultation with every private school in the area. Another commenter asked for clarification of the term "appropriate representatives."

Response: No change has been made. An applicant or subgrantee is required to consult, but the regulations do not require consultation with any representative of private school students who does not respond to reasonable attempts to consult with him or her. EDGAR does not attempt to define the term "appropriate representatives" because the meaning of the term depends on the nature of the program and the local situation.

§ 100b.654 Some or different benefits for private school students.

Comment: One commenter suggested that any differences should be settled at the planning stage and that this section should be deleted. Another commenter suggested that the provisions of proposed paragraph (b) (different services to meet different needs) be made subject to the provisions of proposed paragraph (a) (concentration of funds).

Response: A change has been made. The section has been rewritten to clarify its intent. This section is designed to ensure equitable participation where the needs of the private school students are either the same as or different from those of the public school students. Paragraph (a) of this section, as rewritten, states the general rule that services for private school students must be comparable to services for public school children. In meeting this general rule, paragraph (b) provides, in essence, that when the needs of public and private school students are the same, program services should be the same. Paragraph (c) provides that when needs are different, services must be different. Both paragraphs (b) and (c) are designed to ensure comparable services. It should be noted that paragraph (b) does not authorize concentration of funds or services beyond that authorized under the program statute and regulations. It merely requires that where funds are concentrated, private school children must be given equitable access.

Comment: One commenter suggested that there may be situations in which the needs of private school children may be beyond the skills, interests, and financial resources of the subgrantee.

Response: No change has been made. No situation should arise in which benefits for private school students are beyond the financial resources of the subgrantee, since the benefits for private school students will be federally funded. Nor should a situation arise which is beyond the competence of the public schools, since services for private school children are to be comparable to services for public school children.

Comment: Several commenters suggested dropping the words "who have needs of equal importance" from proposed paragraph (b)(2).

Response: A change has been made. The words have been deleted as unnecessary to the purpose or meaning of the requirements.

§ 100b.655 Level of expenditures for students enrolled in private schools.

Comment: One commenter suggested that this section could result in inequitable funding and should, therefore, be dropped.

Response: No change has been made. The purpose of the section is to provide for equitable services even though there might be unequal costs.

Comment: One commenter suggested that this section implies that the amount spent for private school students can be equal to or greater than the amount spent for public school students. The commenter suggested that, if costs for meeting the needs of public school students are greater, the subgrantee should be able to spend more for public school students.

Response: No change has been made. This section says that "different" amounts may be spent for services for private school students than are spent for public school students. "Different" means "less" or "more," depending on the circumstances. The services must be "comparable," as required by § 100b.654(a) and other sections.

Comment: One commenter suggested that the provision "shall spend a different average amount" is contrary to Title I of the Elementary and Secondary Education Act (ESEA) and that the word "shall" should be changed to "may".

Response: No change has been made. The word "shall" is used in Section 130(a) of ESEA, and § 100b.655 is, therefore, consistent with Title I.

Comment: Two commenters suggested that equal expenditures is not a good way to judge programs and that comparability is preferable.

Response: No change has been made. Comparability of quality, scope, and opportunity for participation (see § 100b.654) is essential regardless of whether the costs are equal. Equal expenditures is acceptable merely as an initial way to compare program services, particularly if the private school children will receive the same services as the public school children. Where

service needs are the same, and costs of meeting those needs are comparable, § 100b.655 could provide a basis for auditing expenditures as a method of achieving compliance. Active consideration is being given to this possibility.

§ 100b.656 Information in an application for a subgrant.

Comment: Two commenters suggested that the number of eligible private school children be included as a required item of information in the application.

Response: A change has been made. The comment has been adopted. This information is necessary to assist the State in ensuring that private school students are receiving comparable benefits under a program. To avoid possible misinterpretations, the section requires the applicant to state the number of private school students "who have been identified as eligible." This should avoid putting an unreasonable burden on the applicant, since the information will be that provided by the appropriate representatives of the private school students.

Comment: One commenter suggested that this section be dropped and that individual program requirements be included in program regulations.

Response: No change has been made. The information required by this section appears to be the minimum needed for a subgrantee to demonstrate that private school children will have an equitable opportunity to participate in a federally assisted program. If the specification of requirements were left to individual program regulations, the likely result would be inconsistent requirements among the programs. Consolidation of requirements should simplify the application process for a school district that applies under several of these programs.

§ 100b.657 Separate classes prohibited.

Comment: One commenter suggested that this section seems to prohibit dual enrollment.

Response: No change has been made. This section permits dual enrollment but prohibits inappropriate segregation of students who are dual enrollees.

§ 100b.658 Funds not to benefit a private school.

Comment: One commenter suggested that the word "eligible" be inserted in paragraph (b) before the phrase "students enrolled in private schools."

Response: No change has been made. These regulations do not impose special eligibility requirements on these children. Eligibility is governed by the program statutes and regulations.

Comment: One commenter suggested dropping paragraph (b). The commenter said paragraph (b)(1) is a repetition of

the language of paragraph (a) and that paragraph (b)(2) would appear to be in conflict with the objectives of such programs as ESEA Title IV-B, which provides library resources, textbooks, and other instructional materials to meet the general needs of students in private schools.

Response. No change has been made. Paragraph (b) prohibits the use of funds to meet the needs of a private school or the general needs of the private school students, regardless of the existing level of instruction referred to in paragraph (a). However, this section should not restrict the provision of materials under ESEA Title IV-B, and the ESEA IV-B program regulations will provide an exception.

§ 100b.659 Use of public school personnel.

Comment. One commenter suggested that there may be other reasons than those given in paragraphs (a) and (b) for providing public personnel on other than public premises. These reasons might, for example, include the health and safety of private school children.

Response. A change has been made. The section has been revised to allow public personnel on nonpublic premises if this is necessary to make programs equitable for private school children. This change is intended to cover other appropriate circumstances, including those suggested by the commenter.

§ 100b.660 Use of private school personnel.

Comment. One commenter suggested that this section implies that administrators can be paid for work outside their regular hours of duty and that this is contrary to Title I, ESEA.

Response. No change has been made. This section applies only to employees of private schools, such as teachers, and does not authorize payment to administrative personnel or other costs that would not be allowable under the particular program.

Other changes. The prohibition against a subgrantee's use of program funds to employ individuals who work part-time at a private school has been deleted from § 100b.680 as being unduly restrictive. Unless specifically restricted by statute (e.g., see 45 CFR Part 134—regulations under Title IV, ESEA), part-time employment by a private school should not automatically disqualify a person from being employed by a subgrantee—for other time periods—to provide program services.

§ 100b.681 Equipment and supplies.

Comment. Two commenters suggested that the term "limited period of time" in paragraph (b), concerning placement of

equipment and supplies in a private school, is misleading and vague and that more specific language would be preferable.

Response. A change has been made to clarify the meaning of the requirement.

Comment. One commenter suggested that paragraph (d) on removal of equipment and supplies be dropped as being implicit in the provisions of paragraph (c), which applies to use and installation of equipment and supplies in private schools.

Response. No change has been made. The language in paragraph (c) requires that it must be feasible to remove equipment and supplies from a private school without remodeling the premises, while paragraph (d) requires removal under specified conditions. The two paragraphs are complementary, not redundant.

§ 100b.680 Inventions and patents. [Proposed]

Changes. Section 100b.680 has been deleted. EDGAR will not regulate on this subject for State-administered programs.

Other Requirements for Certain Programs

§§ 100b.682–100b.685 [Proposed]

Changes. These sections have been renumbered as §§ 100b.681–100b.684. Section 100b.681 has been conformed to the wording in § 100a.681.

General Administrative Responsibilities

§ 100b.701 The State or subgrantee administers or supervises each project.

Comment. Several commenters suggested that the language of this section may prohibit contracting or subcontracting for services that the subgrantee may need but cannot provide itself.

Response. A change has been made. The intent of the section is to prevent the transfer of legal or fiscal responsibility but not to preclude appropriate contracts. The change corresponds to a similar change to § 100a.701. (See the discussion under that section in this appendix.)

§ 100b.703 When a State may begin to obligate funds.

Comment. Several commenters suggested that the term "substantially approvable" be defined so that the States are aware promptly of the date on which they can begin to obligate funds. One of these commenters suggested that the Commissioner promptly inform the States of the date when they could begin to obligate funds even though some negotiation would be necessary to make the State plan fully approvable.

Response. A change has been made in accordance with the last suggestion.

However, the term "substantially approvable" is retained to give the Commissioner flexibility in determining when a plan is close enough to begin approvable to allow a State to begin to obligate funds. This flexibility is necessary because of the wide variations among program statutes and State laws and procedures that affect the content of State plans.

Other changes. Redesignated paragraph (a) has been revised to clarify standards regarding submission of State plans. The date of submission will be determined in the same manner as for applications under Part 100a. A new paragraph (b) provides the standards for determining the date that a State plan was mailed. Proposed paragraph (b) has been redesignated as paragraph (c).

§ 100b.704 When subgrantees may begin to obligate funds.

Comment. One commenter suggested that redesignated paragraph (c)(2) implies that an applicant may begin to obligate funds the moment the application is submitted, whether the State has approved it or not.

Response. A change has been made. The section has been revised to recognize that a State must give authorization before an applicant for a subgrant may begin to obligate funds.

Other changes. 1. A new paragraph (b) has been added to recognize that authorization of obligations is subject to the State's final approval of an application.

2. A new paragraph (c) recognizes the State's authority to approve "pre-agreement" costs under programs in which the applicant for a subgrant is not entitled to the funds.

Cross-reference.—See § 100b.707(h) of EDGAR.

§ 100b.705 Funds may be obligated during a "carryover period."

Comment. One commenter suggested that this section may conflict with the Tydings Amendment.

Response. No change has been made. This section of the regulations restates the Tydings Amendment (Section 412(b) of GEPA) and is not in conflict with it.

§ 100b.706 Obligations made during a carryover period are subject to current statutes, regulations, and applications.

Comment. One commenter suggested that the term "State plan" is more restrictive than the statute on which this section is based, and that the term "other document . . . required" is broader than the statute.

Response. A change has been made so that the terms in this section are consistent with the purpose of the statute (Section 412(b) of GEPA). The term "State plan," as defined in § 100b.102 and as used in this section,

includes the terms "program plan" and "application," as used in Section 412(b) of GEPA, and is, therefore, consistent with the provisions of that statute. The term "other document" has been deleted as inappropriate and unnecessary.

Note.—Section 2(b) of Pub. L. 95-46 (enacted August 6, 1979) provides that Section 412(b)(2) of GEPA, which is reflected in § 100b.700, does not take effect with respect to the use of funds under Section 421 of the ESEA (Title IV-B—Instructional Materials and School Library Resources Program) until October 1, 1980, except at the option of local educational agencies. This section of EDGAR will, therefore, have a delayed effective date to this extent.

§ 100b.707 When obligations are made.

Comment. One commenter asked if there is a time limit on the performance of personal services by a contractor or if the services may be performed after the end of the project period.

Response. No change has been made. The contract for personal services establishes the period for the performance of those services. The services should be performed within the project period approved by the State. However, there is no provision in Part 100b that is comparable to § 100a.261 (Extension of a project period). This is a matter left to State administration.

Comment. One commenter suggested that this section should make clear that a ruling by the Internal Revenue Service that a personal service contractor is actually an employee, rather than a contractor, does not affect the date the Education Division considers the obligation to have been made.

Response. No change has been made. If the personal services contract was entered into legally, and in good faith that the arrangement was not an employee-employer relationship, the provisions of paragraph (c) would be considered binding by the Education Division, even if the Internal Revenue Service ruled, for its own purposes, that the relationship is that of an employer and an employee.

Comment. One commenter suggested that personal services by a contractor should be considered to constitute obligations at the time the services are performed, rather than on the date the grantee makes a binding written commitment for the personal services.

Response. No change has been made. To achieve the purposes of the project, performance under a personal services contract may be necessary after the end of the project period. The Education Division may wish to reimburse grantees in these circumstances, and therefore has not adopted the comment.

Changes. A new paragraph (h) has been added to recognize the State's authority to approve preagreement costs. (See also § 100b.704(c).)

Note.—Under § 100b.707(b), the phrase "personal services by an employee of the State or subgrantee" refers only to services that are within the scope of the employment agreement.

§ 100b.720 Financial and performance reports by a State.

Comment. One commenter asked the following:

1. Who establishes the reporting format?

2. Can the Commissioner require reports more often than annually?

Response. No change has been made.

1. The Commissioner establishes the reporting forms.

2. The Commissioner may require reports more often than annually if the conditions in 45 CFR 74.7 or 45 CFR 74.72(e) exist.

Reports

§ 100b.722 A subgrantee makes reports required by the State.

Changes. Proposed § 100b.721 has been renumbered as § 100b.722 to conform more closely to numbering used in Part 100a.

Records

§ 100b.730 Records related to grant funds.

Comment. One commenter suggested that the requirement for a State or subgrantee to keep records that fully show the "share of that cost provided from other sources" will add a burden to reporting.

Response. No change has been made. The requirement to keep records of those costs is in Section 437(a) of GEPA and cannot be waived.

§ 100b.731 Records related to compliance.

Comment. One commenter suggested that the regulations should specifically identify the statutes listed in § 100b.500 as being covered by this section.

Response. A change has been made. This section does not require the retention of records relating to the statutes identified in § 100b.500. Those records are subject to the regulations referenced in § 100b.500, not to the requirements of EDGAR. The change is intended to make this distinction by limiting the recordkeeping responsibility to "program requirements." (See the discussion under § 100a.731 in this appendix.)

§ 100b.734 Record retention period.

Comment. Three commenters noted that the five-year retention period differed from other periods identified elsewhere, particularly in 45 CFR Part 74 which establishes a retention period of three years. They suggested that this be clarified.

Response. A change has been made. The regulations in 45 CFR Part 74 are subject to any inconsistent statutory provisions. For Education Division programs, the five-year period in Section 437 of GEPA controls the minimum retention period. The change makes it clear that records must be retained for five years unless 45 CFR Part 74 requires a longer period, such as during an ongoing audit procedure. (See 45 CFR 74.21(b).)

Comment. One commenter suggested that subgrantees be given permission to dispose of fiscal documentation prior to the end of the five-year retention period if a Federal audit has been completed.

Response. No change has been made. The statutory authority for the five-year retention period (Section 437(a) of GEPA) makes no provision for shortening the records retention period in situations in which Federal audits have been completed.

Privacy

§ 100b.741 Protection of students' privacy in research and testing.

Comment. One commenter asked if this section applied both to State-administered and to direct grant programs. The commenter asked specifically what programs are covered.

Response. No change has been made. The regulations in Part 100b relate only to the programs listed in the table in § 100b.1, but there is a similar provision in Part 100a (§ 100a.741) that applies to all programs listed in § 100a.1. The statute on which these sections of EDGAR are based applies to all Office of Education programs.

Changes. This section has been revised to include the statutory material that was referenced in the proposed regulations.

Use of Funds by States and Subgrantees

§ 100b.761 Federal funds may pay 100 percent of costs.

Comment. One commenter suggested that the provisions of this section appear to be in conflict with 45 CFR 121a.186 of the program regulations under the Education of the Handicapped Act.

Response. No change has been made. Paragraph (b) of this section excludes programs in which the statute or implementing regulations limit the allowability of costs. 45 CFR 121a.186 establishes limits on costs that may be paid with program funds. Section 100b.761, therefore, does not apply to the projects to which the limitations in § 121a.186 apply.

§ 100b.772 Other responsibilities of the State.

Comment. One commenter suggested that, in the spirit of paperwork reduction, the Commissioner limit the power of the States to impose special regulations, procedures, etc. Another commenter asked for recognition of the State's authority to regulate.

Response. No change has been made. If the State has the legal responsibility to administer a federally funded program, the State must have the authority to establish reasonable rules and procedures. However, State rules and procedures should be designed in a way that minimize burden on applicants and be directly related to furthering the Federal program purpose.

Changes. 1. Paragraph (a) has been rewritten to require that a State provide general technical assistance and also assistance in the evaluation of projects. Under the proposed section, a State would have been required to provide technical assistance only with respect to evaluation of projects.

2. Paragraphs (b) and (c) have been revised to clarify the relationship of § 100b.772 to programs under Title I and IV of ESEA.

Complaint Procedures of a State**§ 100b.780 A State shall adopt complaint procedures.**

Comment. One commenter questioned why the exemptions for Titles I and IV of ESEA provided for in this section are not stated in the same way.

Response. A change has been made. Paragraphs (b) and (c) have been revised to clarify the relationship of this section to the program under Title IV of ESEA. The difference in treatment between programs under Titles I of ESEA and those under Title IV of ESEA results from statutory provisions enacted in the Education Amendments of 1978.

Comment. One commenter suggested that the requirements in this section are excessive and appear to be contrary to the requirements in § 100b.781 (as renumbered).

Response. No change has been made. This section requires the State to establish complaint procedures; § 100b.781 contains certain minimum requirements that must be included in the procedures adopted under this section. The Commissioner believes that these two sections are the minimum necessary to protect the public, the State, and the subgrantees. To clarify the relationship between §§ 100b.781 and 100b.782, the sections have been transposed and renumbered accordingly.

§ 100b.781 Minimum complaint procedures.

Comment. One commenter suggested that this section not apply to due process procedures for students.

Response. No change has been made. The minimum procedures in § 100b.781 relate only to those complaints identified in § 100b.780.

Changes. The section has been revised to make it clear that a State has sixty calendar days from its receipt of a complaint to resolve the complaint. This time limit may be extended only if exceptional circumstances exist with respect to a particular complaint.

§ 100b.783 State educational agency action—subgrantee's opportunity for a hearing.

Other changes. This new section restates Section 425 of GEPA regarding a subgrantee's right to a hearing under certain programs.

Subpart H—What Procedures Does the Commissioner Use to Get Compliance?**§ 100b.900 Waiver of regulations prohibited.**

Comment. One commenter said that paragraph (b) has the legal effect of holding the Federal Government harmless with respect to the acts of its agents.

Response. No change has been made. Paragraph (a) provides that no Federal official has any authority to waive any regulations unless the regulations specifically provide for a waiver. Paragraph (b) provides that, even if a Federal official purports to waive regulations, that individual has no authority to do so; and no one should rely on the purported waiver. This section is a formal notice to that effect.

§ 100b.901 Regulations in 45 CFR Part 74 on suspension and termination. (Proposed)

Changes. This section has been deleted. The Education Appeal Board procedures in Part 100d will govern all suspension and termination proceedings for Office of Education programs.

Note.—The procedures for the Education Appeal Board were published originally as interim final regulations (45 CFR Part 100e) in the Federal Register on May 25, 1979 (44 FR 30528). When published as final regulations today, Part 100e will be redesignated as Part 100d of EDGAR. These regulations are referenced in EDGAR as Part 100d in order to avoid confusion after Part 100d is published in final.

CIVIL RIGHTS OF
INSTITUTIONALIZED PERSONS ACT

42 USC §1997, et. seq.

INSTITUTIONALIZED PERSONS

§ 1997. Definitions

As used in this Act—

(1) The term "institution" means any facility or institution—

(A) which is owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State; and

(B) which is—

(i) for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped;

(ii) a jail, prison, or other correctional facility;

(iii) a pretrial detention facility;

(iv) for juveniles—

(I) held awaiting trial;

(II) residing in such facility or institution for purposes of receiving care or treatment; or

(III) residing for any State purpose in such facility or institution (other than a residential facility providing only elementary or secondary education that is not an institution in which reside juveniles who are adjudicated delinquent, in need of supervision, neglected, placed in State custody, mentally ill or disabled, mentally retarded, or chronically ill or handicapped); or

(v) providing skilled nursing, intermediate or long-term care, or custodial or residential care.

(2) Privately owned and operated facilities shall not be deemed "institutions" under this Act if—

(A) the licensing of such facility by the State constitutes the sole nexus between such facility and such State;

(B) the receipt by such facility, on behalf of persons residing in such facility, of payments under title XVI, XVIII, or under a State plan approved under title XIX, of the Social Security Act [42 USCS §§ 1381 et seq., §§ 1395 et seq., or §§ 1396 et seq.], constitutes the sole nexus between such facility and such State; or

(C) the licensing of such facility by the State, and the receipt by such facility, on behalf of persons residing in such facility, of payments under title XVI, XVIII, or under a State plan approved under title XIX, of the Social Security Act [42 USCS §§ 1381 et seq., §§ 1395 et seq., §§ 1396 et seq.], constitutes the sole nexus between such facility and such State;

(3) The term "person" means an individual, a trust or estate, a partnership, an association, or a corporation;

(4) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States;

(5) The term "legislative days" means any calendar day on which either House of Congress is in session.

(May 23, 1980, P. L. 96-247, § 2, 94 Stat 349.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act May 23, 1980, P. L. 96-247, 94 Stat. 349, commonly referred to as the "Civil Rights of Institutionalized Persons Act", and which generally appears as 42 USCS §§ 1997 et seq. For full classification of this Act, consult USCS Tables volumes.

Short titles:

Act May 23, 1980, P. L. 96-247, § 1, 94 Stat. 349, provided: "This Act may be cited as the 'Civil Rights of Institutionalized Persons Act'."

§ 1997a. Initiation of actions

(a) Whenever the Attorney General has reasonable cause to believe that any State or political subdivision of a State, official, employee, or agent thereof, or other person acting on behalf of a State or political subdivision of a State is subjecting persons residing in or confined to an institution, as defined in section 2 [42 USCS § 1997], to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General, for or in the name of the United States, may institute a civil action in any appropriate United States district court against such party for such equitable relief as may be appropriate, to insure the minimum corrective measures necessary to insure the full enjoyment of such rights, privileges, or immunities, except that such equitable relief shall be available under this Act to persons residing in or confined to an institution as defined in section 2(1)(B)(ii) [42 USCS § 1997(1)(B)(ii)] only insofar as such persons are subjected to conditions which deprive them of rights, privileges, or immunities secured or protected by the Constitution of the United States.

(b) In any action commenced under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs.

c) Any complaint filed by the Attorney General pursuant to this section shall be personally signed by him.

May 23, 1980, P. L. 96-247, Title, § 3, 94 Stat 350.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act May 23, 1980, P. L. 96-247, 94 Stat. 349, commonly referred to as the "Civil Rights of Institutionalized Persons Act", and which generally appears as 42 USCS §§ 1997 et seq. For full classification of this Act, consult USCS Tables volumes.

§ 1997b. Certification requirements

a) At the time of the commencement of an action under section 2 [42 USCS § 1997] the Attorney General shall certify to the court—

(1) that at least 49 calendar days previously he has notified in writing the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution of—

(A) the alleged conditions which deprive rights, privileges, or immunities secured or protected by the Constitution or laws of the United States and the alleged pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities;

(B) the supporting facts giving rise to the alleged conditions and the alleged pattern or practice, including the dates or time period during which the alleged conditions and pattern or practice of resistance occurred; and when feasible, the identity of all persons reasonably suspected of being involved in causing the alleged conditions and pattern or practice at the time of the certification, and the date on which the alleged conditions and pattern or practice were first brought to the attention of the Attorney General; and

(C) the minimum measures which he believes may remedy the alleged conditions and the alleged pattern or practice of resistance;

(2) that he has notified in writing the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution of his intention to commence an investigation of such institution, that such notice was delivered at least seven days prior to the commencement of such investigation and that between the time of such notice and the commencement of an action under section 3 of this Act [42 USCS § 1997a]—

(A) he has made a reasonable good faith effort to consult with the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution, or their designees, regarding financial, technical, or other assistance which may be available from the United States and which he believes may assist in the correction of such conditions and pattern or practice of resistance;

(B) he has encouraged the appropriate officials to correct the alleged conditions and pattern or practice of resistance through informal methods of conference, conciliation and persuasion, including, to the extent feasible, discussion of the possible costs and fiscal impacts of alternative minimum corrective measures, and it is his opinion that reasonable efforts at voluntary correction have not succeeded; and

(C) he is satisfied that the appropriate officials have had a reasonable time to take appropriate action to correct such condition, and pattern or practice, taking into consideration the time required to remodel or make necessary changes in physical facilities or relocate residents, reasonable legal or procedural requirements, the urgency of the need to correct such conditions, and other circumstances involved in correcting such conditions; and

(3) that he believes that such an action by the United States is of general public importance and will materially further the vindication of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) Any certification made by the Attorney General pursuant to this section shall be personally signed by him.

(May 23, 1980, P. L. 96-247, § 4, 94 Stat 350.)

§ 1997c. Intervention in actions

(a)(1) Whenever an action has been commenced in any court of the United States seeking relief from egregious or flagrant conditions which deprive persons residing in institutions of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing them to suffer grievous harm and the Attorney General has reasonable cause to believe that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General, for or in the name of the United States, may intervene in such action upon motion by the Attorney General.

(2) The Attorney General shall not file a motion to intervene under paragraph (1) before 90 days after the commencement of the action, except that if the court determines it would be in the interests of justice, the court may shorten or waive the time period.

(b)(1) The Attorney General shall certify to the court in the motion to intervene filed under subsection (a)—

(A) that he has notified in writing, at least fifteen days previously, the Governor or chief executive officer, attorney general or chief legal officer of the appropriate State or political subdivision, and the director of the institution—

(i) the alleged conditions which deprive rights, privileges, or immunities secured or protected by the Constitution or laws of the United States and the alleged pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities;

(ii) the supporting facts giving rise to the alleged conditions, including the dates and time period during which the alleged conditions and pattern or practice of resistance occurred; and

(iii) to the extent feasible and consistent with the interests of other plaintiffs, the minimum measures which he believes may remedy the alleged conditions and the alleged pattern or practice of resistance; and

(B) that he believes that such intervention by the United States is of general public importance and will materially further the vindication of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(2) Any certification made by the Attorney General pursuant to this subsection shall be personally signed by him.

(c) Any motion to intervene made by the Attorney General pursuant to this section shall be personally signed by him.

(d) In any action in which the United States joins as an intervenor under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs. Nothing in this subsection precludes the award of attorney's fees available under any other provisions of the United States Code.

(May 23, 1980, P. L. 96-247, § 5, 94 Stat 351.)

§ 1997d. Prohibition of retaliation

No person reporting conditions which may constitute a violation under this Act shall be subjected to retaliation in any manner for so reporting.

(May 23, 1980, P. L. 96-247, § 6, 94 Stat 352.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act May 23, 1980, P. L. 96-247, 94 Stat. 349, commonly referred to as the "Civil Rights of Institutionalized Persons Act", and which generally appears as 42 USCS §§ 1997 et seq. For full classification of this Act, consult USCS Tables volumes.

§ 1997c. Exhaustion of remedies

(a)(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) [42 USCS § 1983] by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.

(2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b).

(b)(1) No later than one hundred eighty days after the date of enactment of this Act [enacted May 23, 1980], the Attorney General shall, after consultation with persons, State and local agencies, and organizations with background and expertise in the area of corrections, promulgate minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility. The Attorney General shall submit such proposed standards for publication in the Federal Register in accordance with section 553 of title 5, United States Code [5 USCS § 553]. Such standards shall take effect thirty

legislative days after publication unless, within such period, either House of Congress adopts a resolution of disapproval of such standards.

(2) The minimum standards shall provide—

(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

(c)(1) The Attorney General shall develop a procedure for the prompt review and certification of systems for the resolution of grievances of adults confined in any jail, prison, or other correctional facility, or pretrial detention facility, to determine if such systems, as voluntarily submitted by the various States and political subdivisions, are in substantial compliance with the minimum standards promulgated under subsection (b).

(2) The Attorney General may suspend or withdraw the certification under paragraph (1) at any time that he has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards promulgated under subsection (b).

(d) The failure of a State to adopt or adhere to an administrative grievance procedure consistent with this section shall not constitute the basis for an action under section 3 or 5 of this Act [42 USCS §§ 1997a or 1997c].

(May 23, 1980, P. L. 96-247, § 7, 94 Stat 352.)

§ 1997f. Report to Congress

The Attorney [General] shall include in his report to Congress on the business of the Department of Justice prepared pursuant to section 522 of title 28, United States Code [28 USCS § 522]—

(1) a statement of the number, variety, and outcome of all actions instituted pursuant to this Act including the history of, precise reasons for, and procedures followed in initiation or intervention in each case in which action was commenced;

(2) a detailed explanation of the procedures by which the Department has received, reviewed and evaluated petitions or complaints regarding conditions in institutions;

(3) an analysis of the impact of actions instituted pursuant to this Act including, when feasible, an estimate of the costs incurred by States and other political subdivisions;

(4) a statement of the financial, technical, or other assistance which has been made available from the United States to the State in order to assist in the correction of the conditions which are alleged to have deprived a person of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States; and

(5) the progress made in each Federal institution toward meeting existing promulgated standards for such institutions or constitutionally guaranteed minima.

(May 23, 1980, P. L. 96-247, Title, § 8, 94 Stat 352.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES**References in text:**

"This Act", referred to in this section, is Act May 23, 1980, P. L. 96-247, 94 Stat. 349, commonly referred to as the "Civil Rights of Institutionalized Persons Act", and which generally appears as 42 USCS §§ 1997 et seq. For full classification of this Act, consult USCS Tables volumes.

Explanatory notes:

The bracketed word "General" in the introductory para. is inserted for clarity as a word probably intended by Congress.

§ 1997g. Priorities for use of funds

[(a)] It is the intent of Congress that deplorable conditions in institutions covered by this Act amounting to deprivations of rights protected by the Constitution or laws of the United States be corrected, not only by litigation as contemplated in this Act, but also by the voluntary good faith efforts of agencies of Federal, State, and local governments. It is the further intention of Congress that where Federal funds are available for use in improving such institutions, priority should be given to the correction or elimination of such unconstitutional or illegal conditions which may exist. It is not the intent of this provision to require the redirection of funds from one program to another or from one State to another.
(May 23, 1980, P. L. 96-247, § 9, 94 Stat 354.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES**References in text:**

"This Act", referred to in this section, is Act May 23, 1980, P. L. 96-247, 94 Stat. 349, commonly referred to as the "Civil Rights of Institutionalized Persons Act", and which generally appears as 42 USCS §§ 1997 et seq. For full classification of this Act, consult USCS Tables volumes.

Explanatory notes:

The designation "(a)" appears in brackets, as no subsection (b) of this section was enacted.

§ 1997h. Notice to Federal departments

At the time of notification of the commencement of an investigation of an institution under section 3 [42 USCS § 1997a] or of the notification of an intention to file a motion to intervene under section 5 of this Act [42 USCS § 1997c], and if the relevant institution receives Federal financial assistance from the Department of Health and Human Services or the Department of Education, the Attorney General shall notify the appropriate Secretary of his action and the reasons for such action and shall consult with such officials. Following such consultation, the Attorney General may proceed with an action under this Act if he is satisfied that such action is consistent with the policies and goals of the executive branch.
(May 23, 1980, P. L. 96-247, § 10, 94 Stat 354.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES**References in text:**

"This Act", referred to in this section, is Act May 23, 1980, P. L. 96-247, 94 Stat. 349, commonly referred to as the "Civil Rights of Institutionalized Persons Act", and which generally appears as 42 USCS §§ 1997 et seq. For full classification of this Act, consult USCS Tables volumes.

§ 1997i. Disclaimer; standards of care

Provisions of this Act shall not authorize promulgation of regulations defining standards of care.

(May 23, 1980, P. L. 96-247, § 11, 94 Stat 354.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act May 23, 1980, P. L. 96-247, 94 Stat. 349, commonly referred to as the "Civil Rights of Institutionalized Persons Act", and which generally appears as 42 USCS §§ 1997 et seq. For full classification of this Act, consult USCS Tables volumes.

§ 1997j. Disclaimer; private litigation

The provisions of this Act shall in no way expand or restrict the authority of parties other than the United States to enforce the legal rights which they may have pursuant to existing law with regard to institutionalized persons. In this regard, the fact that the Attorney General may be conducting an investigation or contemplating litigation pursuant to this Act shall not be grounds for delay of or prejudice to any litigation on behalf of parties other than the United States.

(May 23, 1980, P. L. 96-247, § 12, 94 Stat 354.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act May 23, 1980, P. L. 96-247, 94 Stat. 349, commonly referred to as the "Civil Rights of Institutionalized Persons Act", and which generally appears as 42 USCS §§ 1997 et seq. For full classification of this Act, consult USCS Tables volumes.